Supreme Court, U.S.
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No. ____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2002

GERALD FRANK PLUNK
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

WEIDNER & ASSOCIATES, INC.
Attorneys for Petitioner

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271 pp

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 02-35573
	)	
Plaintiff-Appellee,	)	
	)	DC# CV-00-00093-JWS
v.	)	Alaska (Anchorage)
	)	Anchorage
GERALD FRANK PLUNK,	)	
	)	
Defendant-Appellant,	)	ORDER
	)	

Before: REINHARDT and SILVERMAN, Circuit Judges.

Petitioner's petition for reconsideration is denied. *See* 9th Cir. R. 27-10. Petitioner's petition for en banc reconsideration is rejected by the panel on behalf of the court. *See* Gen. Ord. § 6.11.

No further filings shall be accepted in this closed docket.

FILED
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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 02-35573
	)	
Plaintiff-Appellee,	)	
	)	D.C. No. A94-0036 CR (JWS)
v.	)	District of Alaska
	)	Anchorage
GERALD FRANK PLUNK,	)	
	)	
Defendant-Appellant,	)	ORDER
	)	

Before: REINHARDT and SILVERMAN, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

A94-0036—CR (JWS)

P. WEIDNER (WEIDNER)
K. LOEFFFLER (US-ATTNY)
JUDGE SEDWICK
A00-0093-CV (JWS) (certy cy)

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Clerk of Court
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NOV 27 2002
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Deputy Clerk

FOR PUBLICATION AUG 31 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Weidner & Associates

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GERALD FRANK PLUNK,
Defendant-Appellant.

No. 96-30363
D.C. No.
CR-94-00036-JWS
OPINION

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted
February 2, 1998—Seattle, Washington

Filed August 28, 1998

Before: James R. Browning, Otto R. Skopil, Jr., and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

Criminal Law and Procedure/Witnesses

The court of appeals affirmed a judgment of conviction. The court held that in a federal prosecution for controlled-substance crimes, an experienced narcotics officer may testify on the meaning of code words and jargon used by the defendant and his confederates in consummating drug transactions.

The Drug Enforcement Administration (DEA) issued an administrative subpoena to McCaw Communications requesting the telephone records of appellant Gerald Plunk. The subpoena was issued pursuant to 21 U.S.C. § 876(a), which gives the DEA broad powers to investigate violations of federal drug laws. The statute does not expressly provide a right to challenge the Attorney General's subpoena issued under it.

A federal indictment charged Plunk with conspiracy, maintaining a continuing criminal enterprise (CCE), using a communications facility in connection with a criminal drug operation, and possessing cocaine with intent to distribute. The district court denied Plunk's motion to suppress the telephone records the DEA obtained with the administrative subpoena.

During the government's case-in-chief, Detective Jerry Speziale testified as an expert generally on narcotics trafficking, wiretapping investigations, and the meaning of code words and jargon used by drug dealers. He also interpreted for the jury various encoded conversations between Plunk and his associates. Speziale also identified a voice tape recording as Plunk's.

The district court admitted tapes of wiretapped conversations between Plunk and his co-conspirators. The court repeatedly instructed the jury that the tapes were the evidence they should consider, and that transcripts furnished to them were to help in following the conversations, or in identifying the speakers.

Carlos Serrato, one of Plunk's associates, identified Plunk's voice on recordings of several telephone conversations played at trial, and had made a visual identification of Plunk at a photo lineup.

During deliberations, Dana Nichols, a court security officer, notified the court that Nichols had overheard a conversa-

tion in which Juror Mitchell expressed concern that the jury room and the evidence were not secure. Nichols had assured Mitchell that the jury room and the evidence were secure. After discussing the incident with counsel, the court told the jurors in a note that the tape recordings were secure and available, and that the jurors should not be concerned about the issue.

A short time later, the jury asked for a dictionary. In the absence of the judge, the judge's secretary authorized delivery of a dictionary to the jurors. However, the judge had the bailiff retrieve the dictionary before Juror Mitchell, who had wanted to look up "organizer" in connection with the CCE charge, could read the definition. No other juror had viewed the dictionary.

The jurors also asked to have some of the tapes replayed. Over defense objection, the court allowed the jury to audit the tapes and to have the benefit of the transcripts as guides.

On the third day of deliberations, the jurors notified the court that they had reached verdicts on seven counts, but were hung on the remaining three. The court consulted with the attorneys and gave a modified *Allen* charge to continue deliberating in an effort to reach a unanimous verdict, if that could be done without violating individual jurors' judgment and conscience. The court stated that jurors should not change an honest belief as to the evidence based solely on the opinions of other jurors, or merely for the purpose of reaching a verdict. A while later, the jurors announced that they could not reach a verdict as to three counts. The court then received their decision.

The jury found Plunk guilty of conspiracy, using a communications facility, and possession with intent to distribute. Plunk was acquitted on one count of possession with intent to distribute, and the jury hung on one count of conspiracy, one

CCE count, and one count of possession with intent to distribute.

At sentencing, co-conspirator Timothy Pierson testified that Plunk had perjured himself at Pierson's sentencing hearing regarding Pierson's knowledge of the presence of cocaine in delivery vehicles, and his participation in the conspiracy. Based in part on Pierson's testimony, the district court found that Plunk had obstructed justice and imposed a sentence enhancement on that ground.

On appeal, Plunk contended that the district court erred in allowing Detective Speziale to testify as an expert; denying his motion to suppress the fruits of the administrative subpoena; refusing to suppress the voice and photo identifications by Serrato and Speziale; allowing the jury to view the transcripts during deliberations; administering the *Allen* charge; and that the government violated its duty under *Brady v. Maryland* to search for and provide defense counsel with the notes contained in the files of the federal public defender; and that the Double Jeopardy Clause barred the government from prosecuting him because it had previously conducted civil forfeiture proceedings against items of his property.

[1] Speziale's testimony constituted specialized knowledge of law enforcement, not scientific knowledge. Courts evaluating the admissibility of "technical" or "specialized" knowledge like Speziale's determine whether the content of the proposed opinion constitutes a proper subject of expert testimony, and whether the witness possesses the requisite qualifications.

[2] Speziale's testimony concerned a proper subject of expert testimony. Law-enforcement officers with sufficient qualifications may testify concerning the methods and techniques employed in an area of criminal activity. The jargon of the narcotics trade and the codes that drug dealers use constitute specialized bodies of knowledge, and are therefore proper

subjects of expert opinion. [3] The district court was within the bounds of its discretion in qualifying Speziale as an expert and allowing him to testify as such regarding the codes and jargon of narcotics dealers.

[4] Under Fed. R. Evid. 704(b), experts are permitted to give their opinions regarding ultimate factual issues. [5] Rule 704(b) precludes expert testimony of an opinion or inference that the defendant did or did not have the requisite mens rea, and testimony of an opinion or inference which if true would compel the conclusion that the defendant did or did not have the requisite mens rea. Plunk pointed to nothing in Speziale's testimony that comprised an opinion that Plunk intended or knew anything in conjunction with the crimes charged. Nothing in the testimony necessarily compelled such an inference or conclusion.

[6] Plunk did not object to any of Speziale's testimony on the ground that the wiretap conversations were cumulative, confusing, or unduly prejudicial. [7] Before an appellate court may address and correct an error not raised at trial, there must be an "error" that is "plain," and that "affects substantial rights." If all three conditions are met, the court may notice a forfeited error if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

[8] The decoded words and phrases provided by Speziale's testimony carried tremendous probative value. Without them, the jury would have been incapable of comprehending the conspirators' exchanges. The evidence was not merely cumulative of the testimony that came before it. Nor in light of cautionary instructions to the jury was there any significant danger of undue prejudice to Plunk. It was not plain error for the district court to admit Speziale's interpretations.

[9] The subpoena was not directed at Plunk, but at a third-party business. Consequently, Plunk did not have standing to challenge its issuance under the Fourth Amendment unless he

demonstrated that he had a legitimate expectation of privacy attaching to the record obtained. Under longstanding precedent, individuals possess no reasonable expectation of privacy in telephone records. Plunk was also without statutory standing to attack the subpoena because he did not demonstrate that he was within the zone of interests protected by § 876(a).

[10] The Sixth Amendment does not grant the right to counsel at photographic displays conducted by the government for the purpose of allowing a witness to attempt an identification of the offender. Similarly, pretrial voice identifications are not, for Sixth Amendment purposes, critical stages of criminal proceedings. Plunk's Sixth Amendment argument was without merit.

[11] There is no per se rule of exclusion for unnecessarily suggestive identification techniques. If an identification procedure is impermissibly suggestive, the reviewing court must decide if the testimony is sufficiently reliable to be admitted. In gauging reliability, courts consult the totality of the circumstances, paying particular attention to: (1) the opportunity of the witness to observe the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

[12] Although the manner in which the government elicited Serrato's identification was perhaps not perfect, there was little reason to doubt the reliability of the identifications. In addition to the reasons set forth in the district court's ruling, Serrato testified that he had spoken to Plunk on 20 occasions during the course of the conspiracy, and had met with him several times. During neither the photographic nor the voice identification was Serrato told or led to believe that any person in any of the pictures, or on any of the tapes, was Plunk. There was no evidence that Serrato felt pressure to make a

positive identification. [13] Serrato's identifications were not elicited unconstitutionally.

[14] Fed. R. Evid. 901(a) governs the authentication of evidentiary records. [15] Rule 901(a) provides that authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims. Rule 901(b) establishes a low threshold for voice identification offered to determine the admissibility of recorded conversations. So long as the identifying witness is minimally familiar with the voice, Rule 901(b) is satisfied. Speziale was present at Plunk's initial post-arrest interview. The familiarity that he gained through that exposure was sufficient under Rule 901(b)(5) to support his identification of Plunk's voice.

[16] To obtain a new trial, the defendant must establish that actual prejudice resulted from an ex parte contact with a juror. In assessing potential prejudice, the Ninth Circuit distinguishes substantive contact from the kind of technical assistance rendered by security officers in dealing with the physical needs of the jury. Officer Nichols's comment was innocuous. There was no reasonable probability that it affected the jury's deliberative process. Reversal was not required.

[17] Jurors have a duty to consider only the evidence that is presented in open court. However, there is no rule of automatic reversal for a juror's reception of extraneous information, irrespective of the nature of the information, or the manner in which it was received. Rather, when a jury obtains or uses evidence extrinsic to the trial record, a new trial is warranted only if there existed a reasonable possibility that the extrinsic material could have affected the verdict.

[18] Because none of the jurors in this case ever actually viewed the definition of the word "organizer," the extrinsic evidence was never actually considered, obtained, or used by

the jury. Consequently, there could have been no reasonable possibility that the evidence affected the jury's deliberations.

[19] The admission of transcripts as an aid in listening to tape recordings is a matter committed to the sound discretion of the trial court. [20] Standing alone, a defendant's claim that he has been erroneously identified as a speaker in a transcript of a recorded conversation does not constitute an allegation of inaccuracy sufficient to trigger close scrutiny of a decision to permit the jury to view the transcript. Rather, the challenge must run to the accuracy of the conversation itself. Plunk's transcript challenge failed.

[21] The district court's *Allen* instruction must be upheld unless it is clear that the charge had an impermissibly coercive effect on the jury. [22] In assessing coerciveness, courts inquire into (1) the form of the instruction; (2) the total time of deliberation and the time of deliberation following the instruction; and (3) any other indicia of coerciveness.

[23] The judge directed the jurors not to change an honest belief as to the evidence solely because of the opinions of fellow jurors, or for the purpose of returning a verdict. The duration of deliberations and the time that elapsed between the *Allen* charge and the verdict suggested the absence of coercion. [24] None of the other indicia of coercion were present. That the jury rendered a mixed verdict suggested that the jury reviewed the evidence rationally and independently. That the ratio of counts on which the jury reached verdicts to those on which it did not was seven to three, both before and after the charge, negated any inference of coercion. It was not clear from the record that the *Allen* charge had a coercive effect on the jury.

[25] Suppression by the prosecution of evidence favorable to an accused on request violates due process when the evidence is material to guilt or punishment. A prosecutor's *Brady* obligation extends to impeachment evidence. However, the

prosecution has no duty to volunteer information that it does not possess. The notes that Plunk sought were in the files of the federal public defender. Consequently, the prosecution did not possess or control the requested information, and was under no obligation to search for or provide the notes.

[26] Because Plunk did not assert any claim to the seized property, he was not "punished" when it was forfeited. Plunk was not forced to contest the civil forfeiture to protect his Fifth Amendment privilege in the pending criminal case. Thus, Plunk was not placed in jeopardy. The subsequent criminal prosecution was not barred by the Double Jeopardy Clause.

COUNSEL

Phillip Paul Weidner, Phillip Paul Weidner & Associates, Inc., Anchorage, Alaska, for the defendant-appellant.

Daniel S. Goodman, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

We review challenges to convictions and a sentence on various counts which arose out of a coast-to-coast cocaine smuggling conspiracy.

I

During the late 1970s and the 1980s, Gerald Frank Plunk was a relatively small-time cocaine dealer in Anchorage, Alaska. He was supplied throughout the 1980s by Barry

Tendler, a pilot from Florida. Tendler, in turn, received his cocaine from a man named Michael. Michael was involved directly with Colombia's Cali Cartel, and had been entrusted with the responsibility of discovering a new way to smuggle cocaine into the United States. When told of Michael's charge, Plunk expressed his interest in participating. At Michael's behest, both Tendler and Plunk met him in Aruba in September 1992 to discuss possible smuggling arrangements. After a second Aruba rendezvous, Plunk was summoned to Colombia to meet personally with several high-ranking members of the Cali Cartel.

At the meeting in Colombia, Plunk was asked to coordinate the transportation of cocaine from Los Angeles and Houston to the New York City metropolitan area. He was placed in charge of a project that involved the cross-country transportation of cocaine in recreational vehicles. Plunk contacted and hired a number of drivers to move the cocaine across the country. Plunk's drivers successfully completed approximately eighteen drug runs, each of which resulted in the transportation of roughly 200 kilograms of cocaine.

Simultaneously with his motorhome project, Plunk and three of his co-conspirators coordinated the coast-to-coast transportation of cocaine inside produce trucks. The scheme entailed shipping the drugs inside vacuum-sealed bags, which were then placed inside crates of onions and other vegetables to avoid detection. Plunk successfully directed six or seven of these produce-truck hauls. On each occasion, the trucks carried between 200 and 250 kilograms of cocaine.

In December 1993, an independent narcotics investigation by New Jersey State Police uncovered $380,000 cash and a heat-sealing machine traceable to Plunk. A New York state court subsequently authorized a wiretap of several Colombians suspected of narcotics trafficking. Investigators concluded that the monitored telephone conversations suggested the existence of a large-scale conspiracy to transport cocaine

across the United States. They also discovered that a number of calls were placed from a number registered to Plunk. During a monitored conversation on December 10, Plunk mentioned that Hal Booher — one of his drivers, who was attempting to deliver a shipment of cocaine to New Jersey — would be replacing his Alaska license plates with Pennsylvania tags. That same day, a federal district court in Alaska authorized a tap of Plunk's cellular telephone. The agents determined that Plunk had called Booher at a number in Carlisle, Pennsylvania. The next day, the agents stopped Booher in New Jersey and questioned him. Booher consented to a search of the motorhome, which revealed 220 kilograms of cocaine. Booher implicated Plunk as his employer.

A subsequent search of Plunk's Alaska residence uncovered additional incriminating evidence, including several firearms, a scale, and nearly $10,000 in cash. Plunk surrendered himself to Drug Enforcement Administration ("DEA") authorities, and was arrested on March 25, 1994. A month later, Plunk was indicted in federal court on ten separate drug-related counts: two counts of conspiring to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846; one count of maintaining a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848; four counts of using a communication facility in violation of 21 U.S.C. § 843(b); and three counts of possessing cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

A jury found Plunk guilty on one count of conspiracy, four counts of using a communication facility, and one count of possession with intent to distribute. It acquitted him on one count of possession with intent to distribute, and hung on one count of conspiracy, one count of CCE, and one count of possession with intent to distribute. Plunk was sentenced to life imprisonment.

Employing what might be described as a scatter-shot strategy, Plunk challenged his convictions and sentence on thir-

teen separate fronts. We address five of Plunk's claims in an unpublished disposition filed contemporaneously herewith. The balance of Plunk's arguments are as follows:

> (1) the district court erred in permitting a veteran narcotics officer to testify as an expert regarding the meaning of certain code words and jargon used by Plunk and his co-conspirators in consummating drug transactions;
>
> (2) the district court erred in denying his motion to suppress the fruits of an administrative subpoena;
>
> (3) the district court erred in refusing to suppress voice and photographic identifications by a co-conspirator and a voice identification by a narcotics detective;
>
> (4) the district court committed reversible error in refusing to grant a mistrial in the wake of a security officer's brief comment to a juror and the judge's secretary's decision to furnish the jury with a dictionary;
>
> (5) the district court erred in allowing the jury to view transcripts of tape recorded conversations between Plunk and his co-conspirators during deliberations;
>
> (6) the district court committed reversible error by administering an *Allen* charge;
>
> (7) the government violated its obligations under *Brady v. Maryland* by failing to search for and to provide Plunk's counsel with handwritten notes allegedly contained in the files of the federal public defender; and

(8) the Double Jeopardy Clause barred the government from prosecuting him because it had previously conducted civil forfeiture proceedings against items of his property.

We have jurisdiction over Plunk's appeal pursuant to 28 U.S.C. § 1291. We address Plunk's contentions in turn.

II

During its case-in-chief, the government called Detective Jerry Speziale of the New York City Police Department to testify as an expert witness "in the field of narcotics trafficking, including wiretapping investigations, analysis of codes, words, and reference[s] used by narcotics traffickers." Speziale testified as to the general usage of cryptic terminology by drug dealers, and interpreted for the jury various encoded conversations between Plunk and his co-conspirators. On appeal, Plunk challenges the admission of Speziale's testimony under Federal Rules of Evidence 702, 704, and 403.

A

As a threshold matter, Plunk objects that Detective Speziale should not have been allowed to testify as an expert at all. Plunk contends that Detective Speziale's testimony was improperly admitted under the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), because it lacked the requisite "scientific basis." In *Daubert*, the Supreme Court concluded that Federal Rule of Evidence 702[1] had superseded the "general acceptance" test for novel scientific evidence, first articulated in *Frye v.*

[1]Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702.

United States, 293 F. 1013 (D.C. Cir. 1923). The *Daubert* Court held that in order to be admissible under Rule 702, scientific evidence had to be "derived by the scientific method" and of some assistance to the factfinder in determining a fact in issue. *See Daubert*, 509 U.S. at 590-93. The Court went on to suggest a few criteria to guide lower courts' decisions whether to admit scientific testimony: (1) whether the particular theory or technique could be tested; (2) whether the theory or technique presented had been subjected to peer review; (3) whether the theory or technique had a relatively low rate of error; and (4) whether the theory or technique had gained general acceptance in the relevant scientific community. *See id.* at 593-94.

[1] Plunk maintains that Speziale's allegedly expert knowledge of narcotics code terminology does not meet the *Daubert* standard and is, consequently, inadmissible. The unarticulated premise of Plunk's argument, however — that *Daubert* analysis applies to testimony such as that offered by Speziale — is incorrect. It is settled in this circuit that "*Daubert* is confined to the evaluation of 'scientific' expert testimony." *McKendall v. Crown Control Corp.*, 122 F.3d 803, 806 (9th Cir. 1997). Consequently, because Speziale's testimony "constitutes specialized knowledge of law enforcement, not scientific knowledge, the *Daubert* standards for admission simply do not apply." *United States v. Webb*, 115 F.3d 711, 716 (9th Cir.), *cert. denied*, 118 S. Ct. 429 (1997); *accord United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997).[2] Rather, courts evaluating the admissibility of "technical" or "specialized" knowledge such as Speziale's must conduct a more traditional Rule 702 analysis and determine, first, whether or not the content of the proposed opinion constitutes

[2]Our interpretation of *Daubert* is consistent with the Supreme Court's own characterization of its decision. *See Daubert*, 509 U.S. at 590 n.8 ("Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here.").

a proper subject of expert testimony (*i.e.*, "technical[ ] or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue," Fed. R. Evid. 702), and second, whether or not the proposed witness possesses the requisite qualifications (*i.e.*, "knowledge, skill, experience, training, or education," *id.*) in his claimed area of expertise. *See McKendall*, 122 F.3d at 806.

[2] We cannot doubt that Detective Speziale's testimony concerned a proper subject of expert testimony. Ninth Circuit precedent makes clear that, as a general proposition, "[l]aw enforcement officers with sufficient qualifications may testify concerning the methods and techniques employed in an area of criminal activity." *United States v. Espinosa*, 827 F.2d 604, 612 (9th Cir. 1987); *accord United States v. Kearns*, 61 F.3d 1422, 1427 (9th Cir. 1995). More specifically, the jargon of the narcotics trade and the codes that drug dealers often use constitute specialized bodies of knowledge — certainly beyond the ken of the average juror — and are therefore proper subjects of expert opinion. *See United States v. Griffith*, 118 F.3d 318, 321 (5th Cir. 1997); *United States v. Delpit*, 94 F.3d 1134, 1145 (8th Cir. 1996); *United States v. Quintana*, 70 F.3d 1167, 1170-71 (10th Cir. 1995); *United States v. Boissoneault*, 926 F.2d 230, 232 (2d Cir. 1991); *United States v. Rollins*, 862 F.2d 1282, 1292 (7th Cir. 1988); *United States v. Hoffman*, 832 F.2d 1299, 1310 (1st Cir. 1987).

With regard to Detective Speziale's qualifications, the district court concluded that Speziale was "qualified based upon his experience and training . . . and he can testify . . . with specialized knowledge of how drug trafficking is sometimes conducted and speak to the methods and techniques that may be employed." The court based its ruling, *inter alia*, on evidence that Speziale (1) possessed extensive experience working undercover in large-scale drug trafficking organizations, (2) had served as an instructor to the FBI and the DEA on wiretap techniques, and (3) had listened to more than 350

wiretaps in which narcotics traffickers were communicating using codes and other jargon. Although Plunk's attorney sought to make much on voir dire of the fact that Speziale had no formal training in the use of drug-culture code, we are not persuaded. "[H]ard-core drug trafficking scarcely lends itself to ivied halls. In a rough-and-ready field such as this, experience is likely the best teacher." *Hoffman*, 832 F.2d at 1310.

[3] The district court was well within the bounds of its discretion in qualifying Detective Speziale as an expert and allowing him to testify as such regarding the cryptic codes and jargon of narcotics dealers.

B

Plunk next contends that Detective Speziale should not have been allowed to provide his expert opinion as to the meanings of code words contained in recordings of wiretapped telephone conversations between Plunk and his associates. Speziale testified, for example, that the intercepted phrases, "How hungry is Panchito? Would he like to have breakfast?" meant "that Pancho could meet in the morning to be loaded with the cocaine." According to Speziale, Plunk's recorded statement that "maybe I can take some documents with me" meant that Plunk hoped to bring home money from a Los Angeles meeting. Plunk argues that such testimony violated Federal Rule of Evidence 704.

[4] Under Rule 704(a), experts are permitted to give their opinions regarding ultimate factual issues. *See* Fed. R. Evid. 704(a). Rule 704(b) creates an exception, providing that "[n]o expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." Fed. R. Evid. 704(b). We addressed the scope of this exception in *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997) (en banc).

Although other circuits have suggested that the rule applies only to psychiatrists and other mental health professionals, the *Morales* court rejected that narrow interpretation, concluding that 704(b) "extends to all expert witnesses." 108 F.3d at 1036. Thus, the rule applies to Detective Speziale. We disagree, however, with Plunk's contention that Speziale's testimony violated Rule 704(b).

[5] Under *Morales*, Rule 704(b) "only precludes expert testimony of an opinion or inference that the defendant did or did not have the requisite *mens rea* and testimony of an opinion or inference which if true would compel the conclusion that the defendant did or did not have the requisite *mens rea*." *Id.* at 1041. Plunk has pointed to nothing in Speziale's testimony that comprises an explicit opinion that Plunk intended or knew anything in conjunction with the crimes charged. Likewise, nothing in the testimony necessarily compels such an inference or conclusion. *See id.* at 1037. Speziale offered his opinion about the meaning of drug jargon in encrypted exchanges between the conspirators, allowing the jurors to determine for themselves the legal significance of the conversations as interpreted. *See, e.g., United States v. Simmons*, 923 F.2d 934, 947 (2d Cir. 1991) ("[The agent's] testimony, which related only to the meaning of unfamiliar narcotics jargon, left to the jury the task of determining whether the decoded terms demonstrated the necessary criminal intent.").

Plunk argues that this court in *United States v. Bailey*, 607 F.2d 237, 240 (9th Cir. 1979), approved an expert's testimony interpreting terminology commonly used by narcotics dealers, but disallowed questions "as to specific alleged code words used by [the] defendants." Plunk's reliance on *Bailey* is misplaced. The *Bailey* court did not disallow testimony about specific words used by the defendants in that case; the court simply noted that the trial judge had excluded such testimony. *See id.* In fact, this court commented on the prosecutor's proposal — rejected at trial — to question the expert "as to the meaning of words used in . . . individual conversations," cau-

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tioning that "[w]e express no view as to whether the prosecution's proposed procedure would have been proper." *Id.* at 240 n.8.

Bailey does not stand for the proposition that experts testifying about drug jargon may not explain the meanings of specific code words. Under Rule 704(b), the issue is not whether Detective Speziale's testimony included his expert opinion about code words used specifically by Plunk and his associates; rather, the issue is whether the testimony constituted "an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged." Fed. R. Evid. 704(b). We hold that it did not.

C

[6] Finally, with regard to Detective Speziale's expert testimony, Plunk contends on appeal that the district court should have excluded the evidence under Federal Rule of Evidence 403[3] because its probative value was substantially outweighed by its prejudicial effect. A review of the record, however, reveals that, despite his many other objections,[4] Plunk did not object to any of Speziale's testimony on Rule 403 grounds in the district court. He never complained to the trial judge that the evidence regarding the wiretap conversations was cumulative, confusing, or unduly prejudicial. Because Plunk failed to make a Rule 403 objection in the trial court, we review the admission of the testimony under that Rule only for plain

[3]Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

[4]During the course of Speziale's direct examination, Plunk's counsel objected, *inter alia*, on the following grounds: hearsay, confrontation, improper opinion as to mental state, relevance, vagueness, speculation, foundation, leading questions, and nonresponsiveness.

error. *See* Fed. R. Crim. P. 52(b);[5] Fed. R. Evid. 103(d);[6] *United States v. Gomez-Norena*, 908 F.2d 497, 499-500 (9th Cir. 1990).

[7] According to the Supreme Court's most recent articulation of the plain error standard, before an appellate court may address and correct an error not raised at trial, several conditions must be satisfied:

> [T]here must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."

Johnson v. United States, 117 S. Ct. 1544, 1549 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)) (citations and internal quotation marks omitted).

[8] The decoded words and phrases provided by Speziale's testimony carried tremendous probative value; without them, the jury would have been completely incapable of comprehending the conspirators' exchanges. The evidence was not merely cumulative of testimony that had come before it. Nor, in light of the district court's repeated cautionary instructions to the jury that it could assign Speziale's testimony whatever value it wished, was there any significant danger of unfair prejudice to Plunk. Consequently, it was not plain error for

[5]Rule 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

[6]Rule 103(d) provides: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

the district court to admit Speziale's interpretations of the conspirators' encoded conversations.[7]

D

In sum, each of Plunk's challenges to the admission of Detective Speziale's code-interpretation testimony fails. The district court did not abuse its discretion in permitting the evidence.

III

In December 1993, the DEA regional office in Anchorage issued an administrative subpoena to McCaw Communications requesting Plunk's telephone records. The subpoena was issued pursuant to 21 U.S.C. § 876(a), which provides, in relevant part:

> In any investigation relating to his functions under this subchapter with respect to controlled substances . . . the Attorney General may subpena (sic) witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation. The attendance of witnesses and the production of records may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

[7]Indeed, in view of the inherently fact-specific nature of the Rule 403 balancing inquiry, and the special deference to which district courts' decisions to admit evidence pursuant to that Rule are entitled, *see, e.g., Boranda v. Richmond*, 885 F.2d 1384, 1388 (9th Cir. 1988); *United States v. Layton*, 767 F.2d 549, 554 (9th Cir. 1985), it is the rare exception when a district court's decision to admit evidence under Rule 403 constitutes plain error.

21 U.S.C. § 876(a).

[9] On appeal, Plunk argues that the "plain meaning" of § 876(a) precludes the production of documents except in conjunction with an agency hearing. We need not pronounce judgment upon Plunk's novel interpretation of § 876(a), however, because Plunk lacks standing to challenge the issuance of the subpoena. The subpoena was "not directed at [Plunk], but rather at third party businesses"; consequently, Plunk does not have the requisite standing to challenge its issuance under the Fourth Amendment "unless he [can] demonstrate that he had a legitimate expectation of privacy attaching to the records obtained." *United States v. Phibbs*, 999 F.2d 1053, 1077 (6th Cir. 1993). Under longstanding Ninth Circuit precedent, individuals possess no reasonable expectation of privacy in telephone records. *See, e.g., United States v. Lustig*, 555 F.2d 737, 747 n.10 (9th Cir. 1977). Plunk is thus without Fourth Amendment standing to challenge the subpoena. Nor does Plunk possess statutory standing to attack the subpoena, because he has not demonstrated that he was within the "zone of interests" intended to be protected by § 876(a). *See United States v. Moffett*, 84 F.3d 1291, 1293 (10th Cir. 1996). Section 876 was "written to give the DEA broad powers to investigate violations of federal drug laws" and "provides no express right to challenge the Attorney General's subpoenas issued under it." *Id.*

IV

Plunk also challenges the identification testimony of two government witnesses. Carlos Serrato, one of Plunk's co-conspirators, identified Plunk's voice on recordings of several phone conversations played at trial and made a visual identification of Plunk in reliance on what Plunk terms a "highly suggestive" photographic lineup. Detective Speziale also identified a voice on tape recordings admitted into evidence as being Plunk's. We consider their identifications in turn.

A

1

[10] Plunk first argues, as a threshold matter, that Serrato's out-of-court photo and voice identifications, which were conducted well after his indictment, were "critical stages" of the criminal prosecution, and were conducted outside the presence of counsel in violation of *United States v. Wade*, 388 U.S. 218 (1967). Plunk, however, ignores controlling post-*Wade* precedent. In *United States v. Ash*, 413 U.S. 300 (1973), the Supreme Court carefully circumscribed its decision in *Wade*: "[T]he Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender." *See id.* at 321; *accord United States v. Barker*, 988 F.2d 77, 78 (9th Cir. 1993). Similarly, following *Ash*, this court held that pretrial voice identifications "are not, for Sixth Amendment purposes, critical stages of the criminal proceeding." *United States v. Kim*, 577 F.2d 473, 481 (9th Cir. 1978). Plunk's Sixth Amendment "right to counsel" argument is thus without merit.

2

Plunk also contends that Serrato's photographic and voice identifications were conducted in an impermissibly suggestive manner, thus contravening the Due Process Clause of the Fifth Amendment. Specifically, with regard to the voice identification, Plunk complains that the taped exemplar from which Serrato first identified Plunk's voice was prefaced by a female voice saying, "You're looking for Frank?" Serrato, however, denied being influenced by the woman's remark; rather, he testified that he was able accurately to identify Plunk's voice because he had "spoken to him on numerous occasions" and because he recognized both the tone and the pattern of Plunk's speech.

With respect to the photographic identification, Plunk contends on appeal that his "photograph was presented with his name on it, amidst 5 other photographs, one of which was Mr. Serrato himself, and the others were either Colombians known to him or otherwise labeled." Plunk's characterization of the photographic lineup, however, is not entirely accurate. It is true that Serrato was shown approximately six photographs and that three of the photographs depicted men with whom he was familiar; Serrato, however, did not recognize the individuals depicted in two photographs. He identified Plunk in the sixth photograph. Plunk's reference to the fact that his picture was presented to Serrato "with his name on it" is similarly misleading. Although Plunk's name was on the photograph, it was on the *back side* of the print — a side not shown to Serrato during the identification.

[11] Our task in evaluating the constitutionality of the identification techniques is simplified by the fact that photographic and voice identifications are governed by "essentially the same" constitutional standards. *United States v. Pheaster*, 544 F.2d 353, 369-70 (9th Cir. 1976). Even if we assume, for the purposes of decision, that the identification procedures were unnecessarily suggestive, that assumption does not end the inquiry. There simply is no per se rule of exclusion for unnecessarily suggestive identification techniques. *See Manson v. Brathwaite*, 432 U.S. 98, 109-14 (1977); *see also United States v. Kessler*, 692 F.2d 584, 586 (9th Cir. 1982) ("[A]t least some level of suggestibility is legitimate."). If an identification procedure is impermissibly suggestive, the reviewing court must decide "if the identification testimony . . . is nonetheless sufficiently reliable to be admitted into evidence." *United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991); *see also Brathwaite*, 432 U.S. at 114 ("[R]eliability is the linchpin in determining the admissibility of identification testimony."). In gauging reliability, we must consult the totality of the circumstances, paying particular attention to the five factors articulated in *Neil v. Biggers*, 409 U.S. 188 (1972):

(1) the opportunity of the witness to observe the criminal at the time of the crime;

(2) the witness's degree of attention;

(3) the accuracy of the witness's prior description of the criminal;

(4) the level of certainty demonstrated by the witness at the confrontation; and

(5) the length of time between the crime and the confrontation.

See id. at 199-200.[8] An out-of-court identification is admissible, along with the resulting in-court testimony, "if factors indicating reliability outweigh the effect of the suggestive presentation" of the photographs or voice exemplars. *United States v. Wang*, 49 F.3d 502, 505 (9th Cir. 1995).

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[8]Citing *United States v. Field*, 625 F.2d 862, 866 (9th Cir. 1980), Plunk contends that reviewing courts must also take into consideration two other factors, in addition to those catalogued by the Supreme Court in *Biggers*: (1) the presence and influence of other witnesses at the time of the prior identification and (2) any conduct on the part of the government agents tending to focus the witness's attention on the defendant. It would appear, however, that the additional factors Plunk references — which were originally articulated in *Parker v. Swenson*, 332 F. Supp. 1225, 1230-31 (E.D. Mo. 1971), and adopted by the Ninth Circuit in *United States v. Crawford*, 576 F.2d 794 (9th Cir. 1978) — are victims of constitutional desuetude. The most recent Ninth Circuit decision to reference those factors was issued in 1983, *see United States v. Burnette*, 698 F.2d 1038 (9th Cir. 1983), and even that case spoke of them in the past tense. *See id.* at 1045 n.11 ("We formerly employed a somewhat different standard.") On the contrary, the Ninth Circuit cases evaluating out-of-court identifications exclusively under *Biggers* are legion. *See, e.g., United States v. Jones*, 84 F.3d 1206, 1209-10 (9th Cir.), *cert. denied*, 117 S. Ct. 405 (1996); *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), *modified*, 98 F.3d 1100 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 965 (1997); *United States v. Dring*, 930 F.2d 687, 692-93 (9th Cir. 1991). Consequently, we reject Plunk's claim that the *Biggers* factors do not control our decision.

In this case, the district court examined and applied the *Biggers* factors methodically and thoroughly (with the exception of the third, which it found "hard to apply" because there was no "prior description" in the record). First, it found that through their common criminal dealings, "Mr. Serrato had a substantial opportunity to view . . . Frank Plunk." Second, it concluded that Serrato was "both smart and observant," and that, particularly in light of the illegal nature of his activity, he would have "paid close attention to the people [including Plunk] he was dealing with." With regard to the fourth factor, the district court determined that "based on Mr. Serrato's testimony . . . I think he was very certain that . . . the man in the photograph was Mr. Plunk." Finally, the court concluded that the length of time that had elapsed since the crime, although not insignificant, was less than the seven months that the Supreme Court approved in *Biggers*.[9] The district court therefore concluded that the photographic identification was reliable, and thus admissible. The district court also held that "for essentially the same reasons, I'm going to allow [Serrato] to identify the voices on the tape."

[12] Although the manner in which the government elicited Serrato's identifications was perhaps not perfect, there is little reason to doubt the reliability of those identifications. In addition to the reasons set forth in the district court's ruling, Serrato testified that, during the course of the conspiracy, he had spoken to Plunk on twenty separate occasions — "not only on the phone, but also speaking directly to him" — and had met with him in person several times. Moreover, during neither the photographic nor the voice identification was Serrato "told or led to believe that any person in any of the pictures [or on any of the tapes] . . . was [Plunk]," even after he had made the identification. *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), *modified*, 98 F.3d 1100 (9th Cir.

[9]It is also worthy of note with regard to the fifth *Biggers* factor that this court, in *Matta-Ballesteros*, 71 F.3d 754, approved a six-year gap between initial observation and in-court identification. *See id.* at 770.

1996), *cert. denied*, 117 S. Ct. 965 (1997). Finally, there is no evidence in the record that Serrato "felt pressure to make a positive identification." *United States v. Dring*, 930 F.2d 687, 693 (9th Cir. 1991).

[13] For these reasons, as well as those ably articulated by the district court, we hold that Serrato's photographic and voice identifications were not elicited unconstitutionally.

B

Plunk also challenges Detective Speziale's in-court identification of his voice on tape-recorded telephone conversations that were introduced into evidence. Speziale's identification should not have been admitted, Plunk contends, because "[n]o demonstration of [Speziale's] familiarity with Mr. Plunk's voice or voice on tape was offered." Had Plunk objected to Speziale's identification at trial and the district court ruled on his objection, we would review the evidentiary ruling for abuse of discretion. *See United States v. Duran*, 4 F.3d 800, 802-03 (9th Cir. 1993). Plunk, however, did not object to the admission of Speziale's identification testimony at trial; in fact, Plunk's counsel stated that, although he preferred that Speziale not point at Plunk from the witness stand, he "ha[d] no problem with [Speziale] identifying Mr. Plunk." Consequently, we review only for plain error. As discussed earlier, under the plain error standard, before relief may be granted, Plunk must demonstrate (1) that there was "error," (2) that the error was "plain," (3) that the error "affect[s] substantial rights," and (4) that the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 117 S. Ct. at 1549. Plunk's objection to Speziale's voice identification cannot survive even the first prong of the *Johnson* standard, because the district court's admission of the identification was not erroneous.

[14] The nature of Plunk's challenge to Speziale's in-court identification testimony is somewhat different from his objec-

tions to Serrato's out-of-court identifications. With respect to Speziale's testimony, it was the tape recording itself — and not Speziale's identification of the voice on the tape — that was offered as evidence. Consequently, whereas Plunk attacked Serrato's photographic and voice identifications (which were themselves offered as evidence) under the Due Process Clause as being unduly suggestive, his challenge to Speziale's testimony is premised upon Federal Rule of Evidence 901, which governs the authentication and identification of evidentiary records.

[15] Rule 901(a) provides generally that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Rule 901(b)(5) states a more specific rule applicable to voice identifications: It is sufficient that there be an "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Fed. R. Evid. 901(b)(5). Rule 901(b)(5) establishes a low threshold for voice identifications offered to determine the admissibility of recorded conversations. So long as the identifying witness is "minimally familiar" with the voice he identifies, Rule 901(b) is satisfied. *See United States v. Cerone*, 830 F.2d 938, 949 (8th Cir. 1987); *United States v. Cuesta*, 597 F.2d 903, 915 (5th Cir. 1979). The record reveals that Speziale was present in Anchorage at Plunk's initial post-arrest interview. The familiarity that he gained through that exposure was sufficient under Rule 901(b)(5) to support his identification of Plunk's voice on the tape recorded conversations being offered into evidence.

V

Plunk next maintains that the jury that convicted him was contaminated by two separate incidents of alleged miscon-

duct: (1) a security officer's brief comment to one of the jurors, and (2) the provision of a dictionary to members of the jury during deliberations. We examine each in turn.

A

On the morning of the third day of jury deliberations, Judge Sedwick received a note from a court security officer, Dana Nichols, indicating that Nichols had overheard a conversation between one of the jurors, Richard Mitchell, and the jury clerk. According to Officer Nichols, Mitchell had expressed a "concern" that the jury room was not secure. In response, Officer Nichols had attempted to reassure Mitchell: "[T]he jury room and evidence is all secure and that is our discretion over securing the items for the Court." After discussing the incident with counsel, the trial judge drafted a short note to the jury, in which both attorneys assented:

> To the jury: It has come to the attention of the Court that one or more jurors may be concerned that because I ordered the Clerk to retain the tape recordings which are exhibits after the replay of some tapes, that this somehow may create a problem. It does not. The tapes remain secure and available. You should not concern yourselves further about this issue.

Tr. 15:5.

[16] On appeal, Plunk contends that Officer Nichols's brief comment to juror Mitchell that "[t]he jury room and evidence is all secure" constitutes reversible error. Pursuant to Ninth Circuit precedent, however, "[t]o obtain a new trial, the defendant must establish that actual prejudice resulted from an ex parte contact with a juror." *United States v. English*, 92 F.3d 909, 913 (9th Cir. 1996). Plunk has alleged no specific prejudice resulting from Nichols's communication with Mitchell. Nor can we imagine how any would have arisen, given the

decidedly non-substantive nature of Nichols's remark.[19] In assessing potential prejudice, this court has previously distinguished substantive contact from "the kind of technical assistance rendered by [security officers] in dealing with the physical needs of the jury." *United States v. Kupau*, 781 F.2d 740, 743 (9th Cir. 1986); *see also Lee v. Marshall*, 42 F.3d 1296, 1298-99 (9th Cir. 1994) (finding "no hint of prejudice" in a brief discussion between jury members and police officers regarding the repair of a VCR, despite the fact that it was "most likely" the district attorney who had instructed the officers to enter the jury room). Officer Nichols's comment was innocuous. There is no reasonable probability that it affected the jury's deliberative process; consequently, reversal is not required.

B

Shortly after Judge Sedwick had resolved the issue regarding Officer Nichols, the jury sent a note requesting a dictionary. Judge Sedwick, who was on the bench in another matter, had instructed the court clerk that "if the jury requests things like pens or pencils or paper to write on, she could just give them . . . to the jury." When the clerk received the dictionary request, she called Judge Sedwick's secretary, who authorized delivery of the dictionary to the jury room. The secretary then contacted Judge Sedwick, who corrected her, saying "No, that's not appropriate. Stop the delivery of the dictionary." The bailiff immediately retrieved the dictionary from the jury room.

Judge Sedwick interviewed the jurors regarding the incident. According to two jurors' reports, the jury had possession of the book for no more than one or two minutes. Juror Mitch-

[19]This case is worlds away, for instance, from *Parker v. Gladden*, 385 U.S. 363 (1966), in which a bailiff in charge of a sequestered jury stated to a juror, in front of the entire panel, "Oh that wicked fellow, he is guilty," *id.* at 363.

ell, who had requested the dictionary, informed the judge that he had opened the book, and that he had intended to look up the word "organizer,"[11] but that he had been unable to read the definition before the bailiff demanded the return of the dictionary. No other jurors viewed the dictionary. After speaking with the jury, Judge Sedwick specifically instructed the jury that it could not consult the dictionary. He then concluded:

> There's nothing I can do about what has happened. I have satisfied myself that no harm was done, that the deliberations have not been imperiled by the importation into them of something extraneous to the evidence.

Tr. 15:34. Judge Sedwick's own characterization of the incident's impact on the trial is significant, because, although we review alleged incidents of juror misconduct independently, we must accord special deference to the trial judge's impression of the impact of the evidence:

> The trial judge is uniquely qualified to appraise the probable effect of information on the jury, the materiality of the extraneous material, and its prejudicial nature. He or she observes the jurors throughout the trial, is aware of the defenses asserted, and has heard the evidence. The judge's conclusion about the effect of alleged juror misconduct deserves substantial weight.

United States v. Bagnariol, 665 F.2d 877, 885 (9th Cir. 1981).

Plunk now contends that the jury's exposure to the dictionary constitutes reversible error. Because the jury was

[11] In order to convict Plunk on the CCE count, the prosecution had to demonstrate, among other things, that Plunk "occupie[d] a position of *organizer*, a supervisory position, or any other position of management . . . ." 21 U.S.C. § 848(c)(2)(A) (emphasis added).

instructed on the CCE count that it must find as an element of the crime that "the defendant acted as an *organizer*, supervisor or manager of the five or more persons," Plunk complains that "providing the dictionary . . . violated [his] right to equal protection and due process[,] to effective assistance of counsel, to a jury trial, and to protections of a judge in so far as numerous uncensored and inappropriate instructions were undoubtedly read by the jurors."

[17] It cannot be doubted that "[j]urors have a duty to consider only the evidence which is presented to them in open court." *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986). However, there is no rule of automatic reversal for a juror's reception of extraneous information, irrespective of the nature of the information or the manner in which it is received. *See United States v. Steele*, 785 F.2d 743, 745-46 (9th Cir. 1986). Indeed, "not every incident of juror misconduct or bias [even] requires a new trial." *United States v. Hendrix*, 549 F.2d 1225, 1229 (9th Cir. 1977). Rather, whenever a jury "obtains or uses" evidence extrinsic to the trial record, a new trial is warranted only "if there existed a reasonable possibility that the extrinsic material could have affected the verdict." *Marino v. Vasquez*, 812 F.2d 499, 504 (9th Cir. 1987) (quoting *United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979)) (internal quotation marks omitted).

[18] In several cases, we have suggested that courts reviewing juror-misconduct appeals involving extrinsic evidence should consider five separate factors to determine the probability of prejudice: "(1) whether the extrinsic material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the jury discussed and considered it; (4) whether the extrinsic material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict." *E.g., United States v. Navarro-Garcia*, 926 F.2d 818,

822-23 (9th Cir. 1991) (internal quotation marks omitted). This case, however, is different. Because none of the jurors in the instant case ever actually viewed the definition of the word "organizer," the extrinsic evidence (which was the definition itself, and not the dictionary) was never actually "considered," *see Bayramoglu*, 806 F.2d at 887, or "obtain[ed] or use[d]," *see Marino*, 812 F.2d at 504, by the jury.[12] Consequently, by definition, there could be no "reasonable possibility" that the evidence affected the jury's deliberations.

Even if we were to apply the five-part standard, reversal would still be unwarranted. Although the fourth factor might weigh marginally in favor of a finding that the evidence could have impacted deliberations because the dictionary was introduced prior to the verdict being reached, the first, second, and third factors all counsel the opposite conclusion. First, and most importantly, as alluded to above, the definition was never read, and hence was never "received" by the jury. Second, this is not a case like *Steele*, 785 F.2d 743, in which the jury had possession of the dictionary for at least two hours, *see id.* at 745; here, by contrast, even the most liberal estimates place the dictionary in the jury room for only two minutes. Third, and again unlike *Steele*, the definition of "organizer" was not read aloud, and there was no general discussion of the term's meaning.[13] A final consideration weighing against a finding of reversible error — a consideration that fits within *Navarro-Garcia*'s fifth, catch-all factor — is the "substantial weight" that we must give to the district court's own conclusion that "no harm was done, [and] that the deliberations [were not] imperiled."

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[12]At the risk of belaboring the obvious, we pause to emphasize that when a defendant challenges a juror's reception of extrinsic information, he must, as a threshold matter, make a showing that the juror actually received — *i.e.*, either saw or heard — the information.

[13]It is certainly worth noting that the *Steele* court, which had before it a much closer case than this, concluded that there was "no reasonable possibility that the jury's unauthorized use of the dictionary affected the verdict." *See Steele*, 785 F.2d at 749.

C

In sum, we hold that there is no "reasonable possibility" that either Officer Nichols's reassuring comment to juror Mitchell or the brief presence in the jury room of a dictionary materially affected the verdict. Consequently, the incidents do not warrant reversal of Plunk's convictions.

VI

Early in the trial, the district court admitted into evidence a number of tapes of wiretapped conversations between Plunk and his co-conspirators. When the government first sought to play one of the tapes for the jury and to distribute a transcript to accompany the recording, Judge Sedwick carefully instructed the jury as to the appropriate use of the transcripts:

> Ladies and gentlemen, tape recordings of conversations have been received in evidence . . . . A typewritten transcript of the tape recorded conversation is furnished to you for your convenience in assisting you in following the conversation or in identifying the speakers.
>
> . . . It is the tape and not the transcript that is the evidence. Where the conversations are in a language other than English, you'll have to rely on the transcripts and make your decision based upon those. But I emphasize that where the conversation is in English, it is the conversation on the tape that is the evidence, not the transcript.

Tr. 2:57-58. Judge Sedwick repeated his cautionary instruction to the jury each time one of the tapes was played.

During deliberations, the jury sent a note to Judge Sedwick requesting to have several tapes replayed. After some discussion with counsel, and over an objection by Plunk's attorney,

Judge Sedwick decided that the jury would be permitted to hear the tapes once again, and would have the benefit — as it did during the trial — of using the transcripts as guides. Judge Sedwick reassured Plunk's attorney, however, that "the jury [was] going to be told in no uncertain terms . . . that transcripts are not evidence." Judge Sedwick summoned the jurors from the jury room into the courtroom to listen to the tapes. Before playing the requested tapes for the jurors, Judge Sedwick carefully instructed them as he had before:

> . . . The transcripts are available to you if you choose to use them. Let me emphasize that it is what is on the tapes that is evidence. The transcripts are not evidence. They're provided for your assistance. But what you hear on the tapes is the evidence. The transcripts are most assuredly not evidence.

Tr. 14:25-26.

On appeal, Plunk contends — without citation to authority —that Judge Sedwick's decision to allow the jury access to the transcripts during deliberations "violated [Plunk's] right to due process, confrontation, counsel, and to a jury trial." We review the district court's decision to allow the jury to view written transcripts during deliberations only for abuse of discretion. *See United States v. Taghipour*, 964 F.2d 908, 910 (9th Cir. 1992).

[19] It is well established in this circuit that the admission of typewritten transcripts "as an aid in listening to tape recordings . . . is a matter committed to the sound discretion of the trial court." *United States v. Turner*, 528 F.2d 143, 167-68 (9th Cir. 1975). A number of considerations convince us that there was no abuse of discretion here. First, when the transcripts were initially distributed, Judge Sedwick admonished the jury to keep them face down until the tape began to play: "Ladies and gentlemen, don't start looking through those books just yet. Just pass them out, please." Second, the

transcripts themselves were never received into evidence. Third, Judge Sedwick clearly and repeatedly instructed the jury that it was to consider the tapes, and not the transcripts, as substantive evidence. Finally, the parties expressly stipulated that "[i]f called to testify, each [transcript] monitor would identify the conversation they monitored and would testify that the recordings being offered in court are authentic and accurate and complete reproductions of the conversations overheard, monitored and recorded by said monitor." *See United States v. Booker*, 952 F.2d 247, 250 (9th Cir. 1991).

[20] It is also significant that Plunk's attorneys have not pointed to any "substantial[ ] innacura[cies]" in the transcripts. *United States v. Pena-Espinoza*, 47 F.3d 356, 360 (9th Cir. 1995). In fact, the parties expressly stipulated to the fact that "these conversations were reviewed by certified language specialists or Special Agents, employed by the Drug Enforcement Administration, who then prepared to the best of their abilities, complete written or typed verbatim transcripts of these conversations in the English language." Plunk, of course, maintains that he did raise an issue as to the accuracy of the transcripts by arguing that "the use of [his] name over 140 times on the transcript as a speaker was inaccurate and prejudicial." Standing alone, however, a defendant's claim that he has been erroneously identified as a speaker in a transcript of a recorded conversation does not constitute an allegation of "inaccuracy" sufficient to trigger close scrutiny of a district judge's decision to permit the jury to view the transcript; rather, his challenge must run to the substantive accuracy of the conversation itself. *See United States v. Ulerio*, 859 F.2d 1144, 1145-46 (2d Cir. 1988) (cited with approval in *Taghipour*, 964 F.2d 908). "[W]here no issue as to accuracy is raised, it is not an abuse of discretion for a trial judge to allow the transcripts into the jury room." *Taghipour*, 964 F.2d at 910. As a result, Plunk's transcripts-based challenge must fail.

VII

Shortly before noon on the third day of deliberations, the jury sent a note to Judge Sedwick. The note read: "We, the jury, have reached verdicts on seven counts. We are at an impasse on the remaining three counts. How do you wish us to proceed?" After consulting counsel, Judge Sedwick decided to administer a modified *Allen* charge, *see Allen v. United States*, 164 U.S. 492 (1896).[14] Later that afternoon, the jury sent another note indicating that it was still unable to reach a unanimous verdict as to three counts. Judge Sedwick then called the jury into the courtroom to receive its decision.

[21] Plunk contends that the district court's *Allen* charge — when considered in conjunction with its discussion with the jury members regarding their near-unauthorized use of the dictionary — was unnecessarily coercive. We review a district court's decision to issue an *Allen* instruction for abuse of discretion. *See United States v. Wills*, 88 F.3d 704, 717 (9th Cir. 1996). The district court's deliverance of an *Allen*

[14]The charge stated, in relevant part:

> As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict, if each of you can do so without violating your individual judgment and conscience. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors.
>
> During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become persuaded that it is wrong. However, you should not change an honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict. All of you are equally honest and conscientious jurors who have heard the same evidence. All of you share an equal desire to arrive at a verdict. Each of you should ask yourself whether you should question the correctness of your present position.

Tr. 15:49-50.

instruction "must be upheld unless it is clear from the record that the charge had an impermissibly coercive effect on the jury." *United States v. Lorenzo*, 43 F.3d 1303, 1307 (9th Cir. 1995).

[22] There is no per se rule in this circuit preventing the use of *Allen* instructions. *See United States v. Nickell*, 883 F.2d 824, 828 (9th Cir. 1989). Indeed, we recently acknowledged that "[a]n *Allen* charge is, on occasion, a legitimate and highly useful reminder to a jury to do its duty." *Rodriguez v. Marshall*, 125 F.3d 739, 750 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2304 (1998). In assessing the coerciveness of an *Allen* charge, we must inquire into (1) the form of the instruction, (2) the total time of deliberation and the time of deliberation following the instruction, and (3) any other indicia of coerciveness. *See United States v. Cuozzo*, 962 F.2d 945, 951 (9th Cir. 1992).

[23] With respect to the form of the instruction, the court in *Jiminez v. Myers*, 40 F.3d 976 (9th Cir. 1993), emphasized in finding reversible error that the trial judge had failed to "instruct[ ] the hold-out juror not to surrender his or her sincere convictions." *Id.* at 981. There was no similar failure in this case. Quite the contrary, Judge Sedwick specifically directed the jurors "not [to] change an honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors or for the mere purpose of returning a verdict." The total duration of deliberations and the time that elapsed between the *Allen* charge and the verdict also suggest the absence of coercion. The jury had been deliberating for approximately two days when it initially apprised the judge that it was deadlocked as to three counts. After the *Allen* charge was administered, it took the jury roughly two hours to conclude its deliberations. We have, in the past, specifically approved of similar time frames. *See, e.g., United States v. Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985).

[24] None of the "other indicia" of coercion traditionally invoked by courts evaluating *Allen* charges is present in the

instant case, either. Judge Sedwick did not, for instance, know whether the seven decided counts were convictions, acquittals, or (as it turned out) a mixed bag. *See Rodriguez*, 125 F.3d at 751. Nor did he know the identity of the holdout jurors. *See United States v. Sae-Chua*, 725 F.2d 530, 532 (9th Cir. 1984). Moreover, the fact that the jury rendered a mixed verdict — convicting on some counts, acquitting on one, and hanging on others — suggests that it reviewed the evidence "rational[ly] and independent[ly]." *Cuozzo*, 962 F.2d at 952. Finally, the fact that the ratio of counts upon which the jury had reached unanimous verdicts to those upon which it had not was seven to three both before and after the charge negates any inference of coercion. Plunk contends that "[a]lthough the jury had reached a decision as to seven counts and was hung as to three both before and after the *Allen* instruction, there is no way of knowing whether its decision was the same as to the same counts." His speculation, however, is merely that: speculation. It is not "clear from the record" that the *Allen* charge had a coercive effect on the jury. *Lorenzo*, 43 F.3d at 1307.

VIII

At sentencing, one of Plunk's co-conspirators, Timothy Pierson, offered testimony indicating that Plunk had perjured himself at Pierson's own sentencing hearing. Pierson acknowledged under oath that he had personally asked Plunk to testify that Pierson "didn't know that there was cocaine on the trucks, that [he] was tricked, that [he] didn't join the conspiracy or know about it till late November, early December [1993]." He further testified that Plunk had sworn an affidavit to that effect and had testified in person at Pierson's sentencing hearing that the affidavit was correct. Pierson frankly admitted, however, that Plunk's affidavit was false, and that Pierson had in fact known of the conspiracy prior to the December 1993 meeting. Based in large part on Pierson's testimony, the district court found that Plunk had obstructed justice within the meaning of § 3C1.1 of the United States

Sentencing Guidelines,[15] and therefore adjusted Plunk's sentencing level upward two levels, from 41 to 43.[16]

Plunk contends on appeal that Pierson "could have been substantially impeached" by materials in the possession of Pierson's federal public defender, Kevin McCoy. According to Plunk's brief, McCoy's files contained notes, allegedly in Pierson's own hand, that contradicted some of the statements that Pierson made at Plunk's sentencing hearing. Plunk maintains that the prosecution's failures to discover and to disclose the notes constituted a violation of its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).

[25] Pursuant to *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. As Plunk correctly asserts, a prosecutor's *Brady* obligation extends to impeachment evidence. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). However, "[w]hile the prosecution must disclose any [*Brady*] information within the possession or control of law enforcement personnel, it has no duty to volunteer information that it does not possess." *United States v. Monroe*, 943 F.2d 1007, 1011 n.2 (9th Cir. 1991) (internal quotation marks omitted). As a general matter, information "beyond that contained in the government's files" is not subject to the strictures of *Brady*. *See United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 824 (9th Cir. 1985). In this case, the notes that Plunk sought were in the files of the federal public defender; consequently, the prosecution did not "possess" or "control" the requested infor-

[15]Section 3C1.1 provides: "If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels." U.S.S.G. § 3C1.1.

[16]In a separate unpublished disposition filed contemporaneous herewith, we affirm the district court's upward adjustment.

mation. *Cf. United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) (holding that a federal prosecutor had no *Brady* obligation with regard to information in the files of state authorities); *United States v. Friedman*, 593 F.2d 109, 120 (9th Cir. 1979) (holding that a prosecutor had no *Brady* obligation with regard to the diary of a defendant's co-conspirator). The government was therefore under no obligation to search for or to provide the notes.[17]

IX

In October 1994, Plunk filed a motion in the district court seeking an order barring further prosecution. He argued that because certain items of his property had been subject to administrative forfeiture pursuant to 19 U.S.C. § 1609, any criminal prosecution should be precluded by the Double Jeopardy Clause of the Fifth Amendment.[18] Specifically, he pointed to the administrative seizure and forfeiture of (1) a Rolex watch, (2) assorted firearms, (3) $9,660 in U.S. currency, and (4) $967.89 worth of gold. Judge Sedwick granted Plunk's motion and dismissed five counts of the indictment on double jeopardy grounds.

[26] On interlocutory appeal, however, this court reversed Judge Sedwick's decision to dismiss the several counts. *See United States v. Plunk*, Nos. 94-20421, 94-30422, 1995 WL 619299 (9th Cir. Oct. 17, 1995), *cert. denied*, 517 U.S. 1188 (1996) ("*Plunk I*").[19] The court observed that Plunk had received notice of the government's intention to seek forfeiture of his property but had failed to file a claim of ownership;

[17]A contrary rule would have the untoward consequence of eviscerating the attorney-client privilege between public defenders and their clients.

[18]The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

[19]Citation of the unpublished disposition is appropriate for purposes of establishing the law of the case. *See* Ninth Circuit R. 36-3.

consequently, pursuant to § 1609, the government had declared the property forfeited without a formal adjudication. Relying on *United States v. Cretacci*, 62 F.3d 307 (9th Cir. 1995), the *Plunk I* court held that "[t]he administrative forfeiture of unclaimed property . . . does not impose a 'punishment' for purposes of the Double Jeopardy Clause." *Plunk I*, 1995 WL 619299, at *1. Because Plunk had not asserted any claim to the seized property, the court determined, he had not been "punished" when it was forfeited. In reaching its conclusion, the court addressed and dismissed Plunk's contention that "he was forced not to formally contest the civil forfeitures (and thus suffer punishment) to protect his Fifth Amendment privilege in the pending criminal case." Invoking *Cretacci*, the court "rejected 'the argument that by requiring a defendant to claim his property we force him to sacrifice his right against self-incrimination in order to preserve his right against Double Jeopardy.' " *Id.* (quoting *Cretacci*, 62 F.3d at 311). The court concluded:

> In light of the rationale set forth in *Cretacci*, we hold that the forfeiture of Plunk's abandoned property was not a "punishment," and thus Plunk was not placed in jeopardy. Accordingly, the subsequent criminal prosecution is not barred by the Double Jeopardy Clause.

Id. at *2.

In this appeal, Plunk maintains that notwithstanding *Plunk I*, "the instant convictions and sentences and further, the other counts of indictment are jeopardy barred and this court must reverse and remand with an order precluding further prosecution for same." The doctrine of "law of the case," however, precludes a reevaluation of Plunk's contention. Under that doctrine, "the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir.) (en banc) (quoting *In re Rainbow Magazine, Inc.*, 77 F.3d 278,

281 (9th Cir. 1996)), *cert. denied*, 118 S. Ct. 586 (1997). Although courts retain some discretion to revisit issues decided by prior panels, this discretion is limited. *See Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir. 1993). "[T]he prior decision of legal issues should be followed on a later appeal 'unless (1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work a manifest injustice.' " *Kimball v. Callahan*, 590 F.2d 768, 771-72 (9th Cir. 1979) (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)) (enumeration added).

Plunk apparently contends that the Supreme Court's recent decision in *United States v. Ursery*, 518 U.S. 267 (1996) — which was handed down after this court's decision in *Plunk I* — constitutes intervening controlling authority that justifies a departure from traditional law-of-the-case principles. In *Ursery*, the Court held that, as a general matter, "*in rem* civil forfeitures are neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." *Id.* at 292. In making his argument for reversal under *Ursery*, Plunk emphasizes two aspects of the Court's decision. First, he points to the Court's distinction between *in rem* civil forfeiture proceedings, which are purely remedial and therefore do not give rise to a double jeopardy bar, and *in personam* civil penalties, which are often punitive and thus can give rise to such a bar. Second, he points to a footnote in which the Court suggested that even some *in rem* civil forfeitures could constitute "punishment" for double jeopardy purposes: "[W]here the 'clearest proof' indicates that an in rem civil forfeiture is 'so punitive either in purpose or effect' as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause." *Id.* at 289 n.3. Relying on these two portions of *Ursery*, Plunk contends that because "factually, tactically, statutorily, and procedurally, the subject administrative forfeitures . . . were in fact in personam criminal forfeitures tactically directed at [him] to punish him," he is entitled to the

protection of the Double Jeopardy Clause against further prosecution.

The *Ursery* decision does not, however, fit within the narrow exception to the law-of-the-case doctrine for "contrary decision[s]" of "controlling authorit[ies]." *Kimball*, 590 F.2d at 772. Although the United States Supreme Court is, no doubt, a "controlling authority," its decision in *Ursery* was in no way "contrary" to *Plunk I*. *Plunk I* was decided on the ground that Plunk's failure to "assert any claim to the seized property," as authorized by 19 U.S.C. § 1608, deprived him of "any right he had to" it. *Plunk I*, 1995 WL 619299, at *1. This, in turn, defeated any claim under the Double Jeopardy Clause. *See id.* *Ursery* neither spoke to this issue, nor did its holding affect it. Under well-established law-of-the-case doctrine, we therefore may not revisit Plunk's double jeopardy claim. *See Kimball*, 590 F.2d at 772.

X

Plunk has raised numerous challenges to the district court's decision, but to no avail. For the foregoing reasons, we decline to disturb either Plunk's convictions or his sentence.

AFFIRMED.

FILED
AUG 28 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 96-30363
Plaintiff-Appellee,	D.C. No. A94-0036 CR (JWS)
v.	
GERALD FRANK PLUNK,	MEMORANDUM*
Defendant-Appellant,	

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted February 2, 1998
Seattle, Washington

Before: BROWNING, SKOPIL, and O'SCANNLAIN Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Appellant Gerald Frank Plunk appeals his convictions and sentence on various counts arising out of his participation in an interstate cocaine smuggling conspiracy. The relevant facts are known to the parties and we shall not repeat them here except as necessary.

Plunk raised thirteen separate issues on appeal. We deal with only five of those issues here.[1]

One. The district court did not abuse its discretion in excluding Plunk's proffered expert testimony regarding the operation of the minimum-mandatory provisions of the U.S. Sentencing Guidelines. The testimony was merely cumulative of evidence presented earlier in the trial. Moreover, the probative value of the evidence was outweighed by the potential for prejudice. See Fed. R. Evid. 403.

Two. The district court did not abuse its discretion in declining to instruct the jury that the potential punishments of the cooperating witnesses could be considered in assessing their credibility. Instruction 37 sufficiently covered Plunk's theory of the case. See United States v. Hernandez-Escarsega, 886 F.2d 1560, 1570 (9th Cir. 1989).

Three. The district court did not err in refusing to instruct the jury that because conspiracy is a lesser included offense of continuing criminal enterprise ("CCE"), the jury could not deliberate or reach a verdict as to conspiracy until it had reached a unanimous verdict of not guilty as to CCE. Plunk was required but failed to make a timely request for the instruction. See United States v. Jackson, 726 F.2d 1466, 1469 (9th Cir. 1984).

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1 We have addressed eight of the thirteen issues in a separate published opinion filed contemporaneously herewith.

Four. The district court did not abuse its discretion in refusing to continue Plunk's sentencing in light of his assertion that a co-conspirator's attorney had told him that certain wiretaps that had led to evidence against him were illegal. Plunk has not contended that any court has questioned the validity of the wiretaps; his co-conspirator's attorney's speculation is insufficient. See United States v. Lewis, 991 F.2d 524, 528-29 (9th Cir. 1993).

Five. The district court's determination that Plunk had obstructed justice within the meaning of U.S.S.G. § 3C1.1 was not clearly erroneous. There is ample evidence in the record to support the district court's factual finding that Plunk testified falsely at a co-conspirator's sentencing hearing. Upon finding that Plunk had obstructed justice, the two-point sentence enhancement was mandatory. See United States v. Ancheta, 38 F.3d 1114, 1117-8 (9th Cir. 1994).

AFFIRMED.

FILED
OCT 17 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) Nos. 94-30421
	) 94-30422
Plaintiff-Appellant, Cross-Appellee,	) D.C. No. CR-94-
	) 036-01-JWS
v.	)
GERALD FRANK PLUNK,	) MEMORANDUM*
Defendant-Appellee, Cross-Appellant.	)

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted June 5,1995
Submission Deferred June 13, 1995
Resubmitted September 20,1995
Seattle, Washington

Before: BROWNING, WRIGHT, and T.G. NELSON, Circuit Judges

We have jurisdiction over this interlocutory appeal. United States v. Chick, 61 F.3d 682 (9th Cir. 1995).

In United States v. Cretacci, 62 F.3d 307 (9th Cir.1995), we held that if property seized by an agency under the administrative forfeiture procedure, 19 U.S.C. § 1609(a), is not claimed within a specified time limit, the property is declared "forfeited" and may be sold. The administrative forfeiture of unclaimed property simply constitutes the taking of abandoned property, and as such, does not impose a "punishment" for purposes of the Double Jeopardy Clause. Id. at 310.

In this case, Plunk does not dispute that he received notice of the Government's intent to seek forfeiture of the property seized from his home and his person and that he had to file a claim to preserve any right he had to that property. The required notice was also published in USA Today. Plunk did not file a claim and the property was administratively forfeited. If no claim is filed, the Government has the authority to declare the property forfeited without a judicial adjudication. See 19 U.S.C. § 1609; 21 C.F.R. § 1316.77. This declaration has "the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States." 19 U.S.C. § 1609(b). In other words, administrative forfeiture can be used only to obtain the forfeiture of unclaimed property.

Because Plunk did not assert any claim to the seized property, he was not punished when it was forfeited. Further, because Plunk was not a party to the prior administrative forfeiture, he was not in jeopardy and his trial and punishment in the criminal prosecution would not amount to double jeopardy.

Plunk responds that he was forced not to formally contest the civil forfeitures (and thus suffer punishment) to protect his Fifth Amendment privilege in the pending criminal case. He argues that although the notices of seizure did not specify the owner, the actual judgments of forfeiture listed his inmate number and adjudicated him as the owner.

In Cretacci, we rejected "the argument that by requiring a defendant to claim his property we force him to sacrifice his right against self-incrimination in order to preserve his right against Double Jeopardy." Id. at 311. The court pointed out that "[a] defendant's claim of ownership at a pre-trial suppression hearing of property that he contends was unlawfully seized may not be used to prove the defendant's guilt." Id. Similarly, "a defendant's claim of ownership of property that was subject to forfeiture may not be used for that purpose." Id.

Therefore, Plunk is in no different a position than a criminal defendant who wishes to suppress contraband seized from him. Such a defendant must assert ownership of the property in order to claim that its seizure invaded his rights under the Fourth Amendment. See United States v. Salvucci, 448 U.S. 83 (1980).

Further, there was no "adjudication" of Plunk's ownership of the cash, gold, firearms and watch. The two declarations of forfeiture do contain computer-generated information at the top of the documents stating the seizure number, case number, item(s) seized, value, seizure date and place, judicial district, and note: "OWNER: PLUNK, GERALD F.," "SEIZED FROM: PLUNK, FRANK (INMATE #7603)." However, these notations do not rise to the level of a judicial adjudication of ownership where a claim or a petition for remission or mitigation has not been filed.

In light of the rationale set forth in Cretacci, we hold that the forfeiture of Plunk's abandoned property was not a "punishment," and thus Plunk was not placed in jeopardy. Accordingly, the subsequent criminal prosecution is not barred by the Double Jeopardy Clause. Because we reverse the district court's order dismissing the five of twelve counts on the grounds of double jeopardy, Plunk's cross-appeal of the district court's denial of his motion to dismiss the entire indictment is moot and is therefore dismissed.

REVERSED AND REMANDED IN PART, DISMISSED IN PART.

FILED
JUN 04 2002
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
by: /s/ Deputy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,
Plaintiff,

v.

GERALD FRANK PLUNK,

Defendant.

Case Number A00-0093 CV (JWS)
[A94-0036 CR (JWS)]

JUDGMENT IN A CIVIL CASE

___ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__x__ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

THAT defendant's application for post—conviction relief [28 U.S.C. 2255] is dismissed.

APPROVED:

/s/
John W. Sedwick
United States District Judge

6/3/02
Date

Michael D. Hall
Clerk

/s/
(By) Deputy Clerk

FILED
MAY 22 2002
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
By /s/ Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	
Plaintiff-Appellee,	A94-36 CR (JWS)
v.	ORDER FROM CHAMBERS
GERALD FRANK PLUNK,	
Defendant-Appellant,	ORDER

I. MOTIONS PRESENTED

At docket 539, defendant-petitioner Gerald F. Plunk ("Plunk") moved to vacate, modify, or correct his sentence pursuant to 28 U.S.C. § 2255. The government files a motion to dismiss at docket 558. Magistrate Judge Roberts issued an exceedingly thorough report at docket 600 containing recommendations addressing both motions, and a final report at docket 613. Meanwhile, at docket 615, Plunk filed an appeal from the magistrate judge's orders and reports. The appeal essentially repackages the same arguments previously made in Plunk's motion papers and objections, such that disposition of his motion at docket 539 and the government's motion at docket 558 effectively disposes of the appeal at docket 615.

II. BACKGROUND

Plunk is serving a life sentence for drug trafficking offenses. For brevity's sake, the court incorporates the Ninth Circuit's opinion in *United States v. Plunk*[1] for a comprehensive statement of facts underlying this case. Here, in this § 2255 proceeding, Plunk raises a multitude of arguments in the shotgun fashion which characterized his direct appeal.[2] For reasons discussed further below, the court concludes that Plunk's arguments lack merit.

III. STANDARD OF REVIEW

The standard of review for reviewing the magistrate judge's report and recommendation is provided by statute. 28 U.S.C. § 636(b)(1)(C) establishes that this court reviews *de novo* where, as here, objections are raised.

IV. DISCUSSION

The court has independently reviewed the record, particularly the petitions filed at dockets 539 and 540, and the clarification filed at docket 556. The court agrees with the government and the magistrate judge that Plunk has filed a "kitchen sink" petition which offers no persuasive legal or factual support for the relief Plunk seeks. Plunk's motion papers sacrifice clarity for the sake of length and volume. Indeed, fairly construed, Plunk's papers contend that almost every right relating to criminal prosecutions which is guaranteed by the federal constitution was violated, together with some "rights" either not recognized or previously rejected.

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[1]153 F.3d 1011 (9th Cir. 1998).

[2]The Ninth Circuit labeled Plunk's strategy "scatter-shot." *Id.* at 1016.

The report at docket 600 is detailed, precise, and persuasively researched and written. After conducting a *de novo* review, this court concludes that Magistrate Judge Roberts has correctly found the facts and applied the law in all respects. This court therefore adopts his findings and conclusions and writes further merely to emphasize or amplify some of the points discussed at length by the magistrate judge.

A. 21 U.S.C. § 841 Is Constitutional

An *en banc* panel of the Ninth Circuit has rejected Plunk's argument that 21 U.S.C. § 841 is unconstitutional.[3]

B. *Apprendi* Does Not Apply Retroactively

The Ninth Circuit recently held that *Apprendi* does not apply retroactively to cases on collateral review.[4] Plunk's argument to the contrary must therefore be rejected. Furthermore, to the extent, if any, that Plunk contends his indictment was defective by virtue of the use of the word "approximately" to modify specified drug quantities, the United States Supreme Court has recently issued an opinion

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[3] *See United States v. Buckland*, 277 F.3d 1173, 1178-82 (9th Cir. 2002) (en banc).

[4] *See United States v. Sanchez-Cervantes*, 282 F.3d 664, 671 (9th Cir. 2002).

in *United States v. Cotton* which would compel rejection of such an argument on the facts here.[5]

C. Pierson's Testimony

Timothy Pierson was one of Plunk's co-conspirators and a witness who cooperated with the government.[6] Pierson testified that Plunk perjured himself at Pierson's sentencing hearing when Plunk executed an affidavit declaring that Pierson did not know there was cocaine in the trucks and did not know about or join the conspiracy until late November 1993. Plunk contends that the government had a "vest pocket" deal with Pierson that resulted in his receiving a substantial reduction in his sentence (from 27 to 12 years) in exchange for Pierson's testimony implicating Plunk in perjury. As Magistrate Judge Roberts correctly noted, no evidence supports this contention.[7] Furthermore, the government may offer leniency or other sentencing considerations in exchange for a witness' testimony, and such considerations do not constitute giving

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[5]*See United States v. Cotton* ___ U S ___ Slip Op. No. 01-687 (May 20, 2002).

[6]*See United States v. Plunk,* 153 F.3d 1011, 1028 (9th Cir. 1998).

[7]*See* Report and Recommendation, docket 600 at p. 31.

something of value in violation of 18 U.S.C. § 201(c)(2).[8] Plunk's contentions to the contrary are frivolous.

D. Double Jeopardy Issue

Plunk argues that his civil forfeiture proceedings precluded subsequent criminal prosecution. The Ninth Circuit has twice addressed and rejected Plunk's Double Jeopardy argument.[9]

E. Due Process Issue

Plunk's Due Process contention is that the government acted impermissibly when it initiated forfeiture proceedings, thereby forcing Plunk to waive any defense to those proceedings in order to preserve his Fifth Amendment

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[8] *See United States v. Smith,* 196 F.3d 1034, 1038-40 (9th Cir. 1999).

[9] *See, Plunk,* 153 F.3d at 1029-30.

right to self-incrimination in the criminal proceeding. As the magistrate judge correctly notes, the Ninth Circuit has already rejected this argument.[10]

F. Sentencing Arguments

Plunk attempts to raise sentencing arguments not raised on direct appeal. In fact, these arguments were not even raised in his petition; they were first advanced in his response brief. "[N]on-constitutional sentencing errors that have not been raised on direct appeal have been waived and generally may not be reviewed by way of 28 U.S.C. § 2255."[11] The late-coming sentencing arguments are procedurally barred.

G. Detective Speziale's Testimony

The Ninth Circuit rejected Plunk's contention that his rights were violated by permitting Detective Speziale to testify as an expert.[12] For reasons discussed by the magistrate judge, the re-litigation doctrine precludes relief.[13]

H. Fourth Amendment Issues

Under *Stone v. Powell*[14] and its progeny, Fourth Amendment claims may not be raised on collateral review if a petitioner had a full and fair opportunity to litigate the

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[10] *See* Report and Recommendation, docket 600 at pp. 36-38.

[11] *United States v. Schlesinger,* 49 F.3d 483, 485 (9th Cir. 1994).

[12] *See Plunk* 153 F.3d at 1016-1 7.

[13] *See* Report and Recommendation, docket 600 at pp. 44-47.

[14] 428 U.S. 465, 469 (1976).

claims before the trial court and on appeal. Plunk enjoyed such a full and fair opportunity. As pointed out by the magistrate judge, Plunk's Fourth Amendment arguments are therefore barred by the re-litigation doctrine.[15]

I. Jury Instruction

Plunk's jury instruction argument was raised on direct appeal, and rejected by the Ninth Circuit.[16] As the Magistrate Judge correctly concluded, this argument is also barred by the re-litigation doctrine.[17]

J. Other Arguments And Issues

This court's *de novo* review confirms that Magistrate Judge Roberts recommendations set out the appropriate resolution of all the other remaining arguments and issues raised by Plunk.

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[15] *See* Report and Recommendation, docket 600 at pp. 47-49.

[16] *See Plunk* 153 F.3d at 1026-27.

[17] *See* Report and Recommendation, docket 600 at p. 49.

V. CONCLUSION

For the foregoing reasons,

(1) Plunk's motion at docket 539 filed pursuant to 28 U.S.C. § 2255 is **DENIED**;

(2) The United States' motion to dismiss at docket 558 is **GRANTED**; and

(3) Plunk's appeal at docket 615 is **DENIED**.

DATED at Anchorage, Alaska, this 22nd day of May 2002.

/s/
JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

FILE
APRIL 08 2002
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. GERALD FRANK PLUNK, Defendant,	No. A94-036 CR (JWS) FINAL RECOMMENDATION DEFENDANT'S MOTION UNDER 28 U.S.C. § 2255; AND GOVERNMENT'S MOTION FOR RECOMMENDATION OF DISMISSAL

The magistrate judge has reviewed Mr. Plunk's objections to his initial report and recommendation (Docket No. 600 with technical corrections at No. 603) and the Government's responses thereto. (Docket Nos. 605 and 610). Plunk has requested oral argument before the magistrate judge and the assigned district judge. (Docket No. 607). The magistrate judge does not deem oral argument necessary. The assigned district judge will make his own decision on that question. Additionally, at docket No. 606

Plunk moved to file a relevant brief from a matter pending before the United States Supreme Court. (Docket No. 606). That motion was granted. Nothing in the objections causes the magistrate judge to modify his initial recommendation that Plunk's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 be denied. A few comments, however, are in order.

First, Plunk was allowed 15 pages in which to state his objections. That is three times more than the usual amount. He devotes space at a lengthy footnote number 1 to stating that he is reiterating all previous arguments, thereby intimating the 15 page limit was burdensome. The fact that Plunk then devoted more than a full page to the allegedly defective indictments raised for the first time in his "conditional motion to amend", which was separately briefed and has nothing to do with the instant matter *(See* court's order at docket No. 601) belies any complaint about restrictions on the length of objections. (See page 2 of Plunk's objections, footnote 2, and pages 7-8).

Secondly, at page 3 of his objections Plunk states: "the recommendations are in error at p.3 in stating that Plunk allegedly agrees that the only appendix in his original notice motion relevant to his list of claims is appendix C. In point of fact, all the appendices are relevant, as are the subsequent pleadings, including the pending briefing and excerpts of record as discussed herein regarding the double jeopardy issues before the Ninth Circuit." It is mysterious that Plunk did not raise this point in his "statement of further clarification" in reply to the government's assertion to the contrary. At footnote 1 of that pleading he did, however, state that the court was charged with taking judicial notice of all facts, pleadings and records in the case. Regardless, it is incumbent upon a petitioner to show how the various appendices and other matters upon which he relies support his claims. The court's review of Plunk's arguments took into consideration all of the matters he directed the court's

attention to. The court therefore has no problem in acknowledging a broader set of attachments to the petition, but notes that they are of no moment. Plunk, has made his record in this regard.

Finally, as discussed in the court's order at docket No. 603, Plunk's claims under *Apprendi v. New Jersey,* 530 U.S. 466 (2000) are not cognizable in this § 2255 petition. In *United States v. Cervantes-Sanchez,* No. 98-35897 slip op at 4301-4302 (9th Cir. March 1, 2002) the Ninth Circuit held that *Apprendi* is not a watershed rule under *Teague v. Lane,* 489 U.S. 288 (1989) and therefore does not apply retroactively to cases on collateral review. The Ninth Circuit made it clear that this rule is applicable to all cases and should not be applied on a piecemeal basis.

CONCLUSION

For the foregoing reasons the magistrate judge hereby declines to modify his recommendation that Plunk's motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255 (Docket No. 539) be **DENIED**. Accordingly, the magistrate judge also declines to modify his recommendation that the government's request for dismissal for failure to meet or address the court's orders and rules of jurisdiction and procedural default (which was part of the government's opposition brief and tracked by the Clerk as a separate motion at Docket No. 558) be **DENIED as moot** since it is subsumed in the disposition of the motion at docket No. 539.

DATED at Anchorage, Alaska, this 8th day of March, 2002.

/s/
United States Magistrate Judge
[John D. Roberts]

FILED
MAR 05 2002
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. A94-036 CR
vs.	)	(JWS)
	)	
	)	REPORT AND
GERALD FRANK PLUNK,	)	RECOMMEN-
	)	DATION
Defendant,	)	
	)	

The court has now before it a motion by Mr. Gerald Frank Plunk seeking to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (Docket No. 539 with court ordered statement of further clarification at No. 556; notice of additional authority at 557). The government filed an opposition to the motion at docket No. 558 (supplemental authority at No. 562), together with a request for recommendations of dismissal for failure to meet or address the court's orders and rules of jurisdiction and procedural default. Plunk filed a reply to the request for dismissal (which was also an opposition brief at docket No. 573A) (table of contents at No. 575), and the government filed a reply at docket No. 579. Supplemental briefing was received

concerning *United States Of America v. Buckland,* 259 F.3d 1157 (9th Cir. 2001), *reh'g en banc granted,* 265 F.3d 1085(9th Cir. 2001). (Docket Nos. 592 and 597). Concomitant with his supplemental brief, Plunk filed a "Conditional Motion To Amend Petition For Habeas Corpus Relief And 28 U.S.C. § 2255 and 28 U.S.C. § 2241, ET SEQ. Relief (And To Relate Back)/Original Filing Under The U.S. Constitutional Right(s) To Writ Of Habeas Corpus/Coram *Nobis".* (Docket No. 596). The vast majority of Plunk's supplemental brief relates to the newest theory(s) of his case, which relies on *Buckland* and its progenitor *Apprendi v. New Jersey,* 530 U.S. 466 (2000) to attack the indictment and includes but is not to limited attacks on the court's jurisdiction and violations of due process as to all counts of conviction. To the extent that Plunk's supplemental brief conforms to the court's order directing said brief it has been given due consideration herein. Otherwise, it has been ignored, and may be considered at some future time only if the so called "conditional motion to amend" is granted. Notably, Plunk's supplemental brief slips in other arguments not related to his new theories or the *Buckland* issue he was directed to brief. Oral argument was requested by Plunk at docket Nos. 574 and 598 but is not deemed necessary to the disposition of the motions.

Plunk's motion was filed on the standard form from the Appendix of Forms attached to the Rules governing a Section 2255 motion. Several appendices are attached thereto. Plunk does not dispute the government's view, and in fact implicitly agrees through his statement of further clarification, that of the appendices attached to his original motion it is only Appendix C that is relevant to the list of claims he is bringing in this motion. The other Appendices relate to the required listing of grounds contained in other petitions. Thus, the court looks to Appendix C and the statement of further clarification in order to decipher Plunk's

grounds for relief. Plunk's motion and briefs string together a rambling of theories and fail to confront the many of the specific arguments of the government. Some of the stated theories are disjointed and redundant. *(i.e.* Nos. 4, 5, and 6 of Appendix C). None the less, the court has done its level best to address every conceivable argument he seems to be making. As the "statement of further clarification" contains new and supplemental grounds under *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000), and because many of Plunk's grounds are presented hither and fro as intermixed claims of constitutional violations, they shall be taken up in an order which does not track their order in Plunk's motion.

BACKGROUND

Prior to his trial, Plunk successfully moved to dismiss the indictment against him on the grounds that the prosecution was barred under the double jeopardy clause of the Fifth Amendment because of an administrative forfeiture proceeding as to certain property. The Ninth Circuit reversed that decision under its holding in *United States v. Cretacci,* 62 F.3d 307 99th Cir. 1995). At trial by jury Plunk was convicted of one count of conspiracy to distribute cocaine (Count 1), four counts of using a communication device in the commission of a drug trafficking crime (Counts 3-6), and one count of distributing cocaine (Count 11) . Plunk was acquitted on one count of distributing cocaine (Count 9) and the jury hung on three remaining counts: The continuing criminal enterprise count (Count 2) one count of distributing cocaine (Count 10), and one count of conspiring to distribute cocaine (Count 12). The court conducted an analysis under the sentencing guidelines and sentenced Plunk to life in prison.

I

THE CONSTITUTIONALITY OF 21 U.S.C. §S 841(b) (1) (A)&(B) AND PLUNK'S LIFE SENTENCES UNDER APPRENDI v. NEW JERSEY, 530 U.S. 446, 490 (2000)

Plunk posits that his life sentences for Count 1 and Count 11 must be vacated because they were based on convictions of and made pursuant to 21 U.S.C. § 841(b) (1) (A) all of which was in violation of his constitutional rights. In *Apprendi v. New Jersey,* 530 U.S. 446, 490 (2000) the Supreme Court held that an increase in a statutory maximum penalty for an offense without submission to a jury for a finding of guilty beyond a reasonable doubt, violated the constitutional rights to due process and jury trial. With the exception of the application of *Apprendi* to the sentencing guidelines *(II below)* all of the *Apprendi* issues are discussed hereunder.

A Ninth Circuit three judge panel decision held that 21 U.S.C. §§ 841(b) (1) (A) & (B) are facially unconstitutional under *Apprendi,* and that imposing a sentence more than the maximum under those enhancements was plain error that affected the defendant's substantial rights, and which seriously affected the fairness, integrity or public reputation of judicial proceedings. *United States Of America v. Buckland,* 259 F.3d 1157 (9th Cir. 2001), *reh'g en banc granted,* 265 F.3d 1085(9th Cir. 2001). Rehearing the case en banc, the Ninth Circuit affirmed the district court finding in that § 841 is not facially unconstitutional because it is "fairly possible" to give § 841 and its provisions a constitutional construction. *United States v. Buckland,* 277 F.3d 1173, 1178-1182 (9th Cir. 2002).[1]

[1]Throughout the rest of this report and recommendation the reference to the *Buckland* case is meant to reference the Ninth Circuit's decision en banc.

With this newly minted law from the Ninth Circuit before it, the court dispenses with Plunk's *Apprendi* claims. First, because § 841 is not facially unconstitutional, the fact that the quantity of drugs that led to an increase in Plunk's sentence was not submitted to a jury and proved beyond a reasonable doubt is not in and of itself dispositive. Rather, as that Ninth Circuit did in *Buckland,* the court must look to see whether the *Apprendi* error is harmless. The court has reviewed the transcripts of Plunk's objections to jury instructions and notes that there were no objections relating to them which are pertinent to the instant motion. *(See* Docket No. 460, transcript of trial by jury, 12th day Vol. XII at pages 12—7 through 12—22). In *Buckland* because the defendant did not object to the district court's use of the preponderance of the evidence standard in finding the requisite drug quantities under 21 U.S.C. § 841, the court applied the plain error standard. In the instant case, Plunk's counsel did make some objections, albeit oblique objections, to the court's use of the preponderance of the evidence standard in fact—finding for sentencing purposes. The transcript of the sentencing hearing of November 18, 1996 (Docket No. 461) reveals:

> MR. WEIDNER: Well, in any event, Your Honor, there is — there's case law saying that we are using a preponderance of the evidence standard, that you should factor into a potential downward departure and adjustment because you're bringing in evidence - or bringing in findings to aggravate the sentence that weren't proven beyond a reasonable doubt.

Pages 65-66.

> MR. WEIDNER: Well, Your Honor, there is some case authority saying that you can consider departing downward where you've made numerous findings on preponderance of the evidence that increases a defendant's exposure. And that's in essence what you've done here.

Page 145.

Giving wide breadth to these objections, they are not fairly construed as objections to the use of the preponderance of evidence standard employed by the court in determining the quantity of drugs used to calculate Plunk's sentence. Rather, they constituted an ambiguous request for downward departure from the guidelines when the preponderance of evidence standard is employed as to numerous findings used in determination of sentencing.

Unlike *Buckland,* and as the government correctly argues, this case is not subject to the plain error standard of review. The more stringent cause and prejudice rule applies to an issue raised in a § 2255 petition that was not raised on direct review. *Untied States v. Frady,* 456 U.S. 152, 167 (1982). Under this standard the defendant must show both (1) "cause" excusing his double procedural default, and (2) "actual prejudice" resulting from the errors of which he complains. *Id.* at 168. Where the error in question concerns a jury instruction the degree of prejudice required is measured by asking "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' not merely whether the 'instruction is undesirable, erroneous, or even universally condemned.'" *Id.* at 169 quoting *Cupp v. Naughten*, 414 U.s. 141, 147, 146 (1973). Habeas review is an extraordinary remedy and "'will not be allowed to do service' for an appeal." *Bousley v.*

United States, 523 U.S. 614, 621 (1998) citing *Reed v. Farley,* 512 U.S. 339, 354 (1994). First, however the court explores the threshold issue of whether *Apprendi* can be applied to this § 2255 petition.

A. Retroactivity of Apprendi.

A new rule of criminal procedure does not apply retroactively on collateral review unless it meets certain stringent requirements. While *Teague* involved a § 2254 petition for habeas corpus from a state court conviction, part of its analysis is applicable to § 2255 petitions. *U.S. v. Pittman,* 120 F.Supp.2d 1263, 1267-1269 (D.Or. 2000). There, citing *Teague* 488 U.S. at 305, the court teaches that in a § 2255 petition the following analysis applies:

> Under *Teague,* as a threshold matter, the court must first determine if the rule in question is a *"new"*. Then, a habeas corpus petitioner who seeks to set aside his conviction or sentence based upon a Supreme Court decision announcing a "new" procedural rule must establish that the rule falls within one of two exceptions. The general principle announced in *Teague* is that new procedural rules should not be applied retroactively primarily out of respect for the doctrine of finality. If it is determined that a new rule exists, it should be applied retroactively only in two limited instances: (1) if the new rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe..." or (2) "if it requires the observance of those procedures that are implicit in the concept of ordered liberty."

The rule of *Apprendi* is "new" for purposes of a *Teague* analysis. *Jones v. Smith,* 231 F.3d 1227, 1236 (9th Cir. 2000). Turning to the two *Teague* exceptions, the first is plainly inapplicable since the government's authority to punish Plunk for distribution of cocaine in any quantity is beyond question. *See Id.* at 1237.

The second *Teague* exception requires the retroactive application of certain "watershed rules of criminal procedure." *Teague,* 498 U.S. at 312. Plunk submits that the constitutionally mandated rules of *Apprendi* are "watershed" rules within the meaning of *Teague v. Lane,* 489 U.S. 288 (1989) and must therefore be applied retroactively to his petition. Retroactive application will occur where both (1) a failure to adopt the new rule "creates an impermissibly large risk that the innocent will be convicted," and (2) "the procedure at issue ... implicate[s] the fundamental fairness of the trial." *Id.* In order to qualify under this exception the new rule must do more than systemically enhance the reliability of a criminal proceeding; the rule must be an absolute prerequisite to the trial's fundamental fairness. *Jones,* 231 F.3d at 1237 citing *Carriger v. Lewis,* 948 F.2d 588, 598 (9th Cir. 1991). The analysis in the *Jones* is instructive here:

> In the case at bar, the *Apprendi* rule, at least as applied to the omission of certain necessary elements from the state court information, is neither implicit in the concept of ordered liberty nor an absolute prerequisite to a fair trial. Certainly, any civilized society will grant a criminal defendant the right "to be informed of the nature and cause of the accusation" against him. U.S. Const. amend. VI. But we need not strain our imaginations too much in

> order to envision a fundamentally fair trial in the aftermath of a flawed information. Indeed, the facts of the case at bar amply illustrate that the text of an information is not the only means for informing a defendant of the nature and cause of the accusation. *Where the defendant has actual notice of the nature and cause of the accusation against him, as well as the possible sentences he might receive, the omission of particular key words from the written information neither increases the risk that an innocent person will be convicted nor hinders the fundamental fairness of the trial. We therefore decline to apply the Apprendi rule, insofar as it effects discrepancies between information and jury instructions, retroactively to Petitioner's claim.*

Id. at 1238 (emphasis added). The above quote from *Jones* begins with the words: "In the case at bar," and it is beyond cavil that *Jones* was limited to its facts. Mr. Plunk's case, is distinguished from the *Jones* case. Despite the discrepancy between the information and the jury instructions in *Jones,* at the end of the day the jury was instructed and therefore did decide the elements of the charge which would subject the defendant to an sentencing enhancement beyond the statutory maximum. *Id. "Jones v. Smith* did not involve the issues directly raised in *Apprendi",* and case law is clear that the determination of the retroactive application of a new Supreme Court rule cannot depend upon the facts of a particular case. *Pittman,* 120 F.Supp.2d at 1268—1269. In Mr. Plunk's case, (as discussed "(B) (2) Prejudice and the application of *Buckland"* below) the jury was not instructed on the necessary elements of the sentencing enhancements

under § 841 as to Count 1, and was arguably not so instructed as to Count 11. The Ninth Circuit has yet to address the question of whether *Apprendi* meets the second exception under *Teague*. However, in a concurring opinion Judge Pregerson, remembering that this *Teague* exception to non-retroactivity, frequently referred to as the "second exception", refers to "those watershed rules of criminal procedure" that "alter our understanding of the bedrock procedural. elements essential to the fairness of a proceeding", reasoned:

> The Supreme Court announced in *Apprendi* that "[a]t stake in this case are constitutional protections of surpassing importance." *Apprendi* 120 S.Ct. at 2355. The Court characterized the right to a jury trial of every element of the offense and the standard of proof, beyond a reasonable doubt, as "basic principles" of our legal system, *Hoffman v. Arave*, 236 F.3d 523, 547—548 (9th Cir. 2001).
>
> . . . . . .

Judge Pregerson went on to note that *Apprendi* held:

> there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof. *Id.* at 2359, 2366.

Id. at 548.

The court finds the cogency of Judge Pregerson's interpretation of *Apprendi*, somewhat compelling, especially

when coupled with the Supreme Court's acknowledgment of the gravity of its rule. *See also Reynolds v. Cambra,* 136 F.Supp.2d 1071, 1087-1089 (C.D.Cal. 2001). Unlike the past, the future will require that sentencing enhancements that exceed the statutory maximum, and which were formerly left to judges to decide by less than evidence beyond a reasonable doubt, be presented to juries requiring proof by the ultimate quantum of evidence required in American Jurisprudence. This reasoning holds more sway than that of *Pittman* which emphasizes that respect for the doctrine of finality was a critical component of the narrowness of the Court's decision in *Teague. Pittman* at 1270. The court in *Pittman,* was greatly distressed by the possibility of having to review thousands of sentences given that every court in every jurisdiction has treated drug quantity as a sentencing factor for the judge to determine for over ten years. *Pittman* at 1270. This may be true, but in light of *Buckland,* and the decisions of every other circuit court to consider *Apprendi* and § 841, the bulk of these types of cases will be easily decided. Moreover, this concern of opening the flood gates regarding drug quantity/sentencing cases, pays too little heed to another principle relied on in *Pittman.* That is "that determination of the retroactive application of a Supreme Court Rule cannot depend upon the facts of a particular case." *Id.* at 1269. *A fortiori* the retroactive application of a Supreme Court rule cannot be applied differently between categories of cases. If it is not applied to § 841 cases because of the large number of cases that will necessarily be reviewed, then it would not be applied to other cases where the *Apprendi* issues have nothing to do with drug quantities.

Irrespective of the foregoing, at the end of the day, the court is persuaded by those few circuits that have ruled on this issue, and have held *Apprendi* is barred from retroactive application by the *Teague* doctrine. See *United*

States v. Sanders, 247 F.3d 139, 151 (4th Cir. 2001); *United States v. Moss,* 252 F.3d 993, 1000 (8th Cir. 2001); *Mccoy v. United States,* 266 F.3d 1245, 1258 (11th Cir. 2001). In these cases the Fourth, Eighth and Eleventh Circuits basically conclude that the rule of *Apprendi* is not of the magnitude of the "'small core of rules requiring observance of those procedures that .... are implicit in the ordered concept of liberty.'" *Moss,* 252 F3d at 998 citing *O'Dell v.* Netherland, 521 U.S. 151, 157 (1997). An example of a "watershed" rule cited by these cases is the landmark decision of *Gideon v. Wainwright,* 372 U.S. 335 (1963). *Id.* Indeed, the idea that every element of a crime must be proven beyond a reasonable doubt is not new, rather application of the axiom to what heretofore was considered the province of the court at sentencing is what is new. In *Sanders,* the Fourth Circuit reasons that shifting the fact-finding duties from an impartial judge to a jury and changing the standard of proof to beyond a reasonable doubt for only an element of an offense, while promoting marginally more accurate results, will not "'alter our understanding of the bedrock elements essential to the fairness of a proceeding.'" *Sanders,* 247 F.3d at 148—150 quoting *Sawyer v. Smith,* 497 U.S. 227, 242 (1990). Of paramount importance for the court in *Sanders,* followed by the court in *Moss,* and what sways the court here, is the following point:

> Further supporting our view that *Apprendi* does not rise to the level of a watershed change in criminal procedure is the fact that the majority of the federal circuit courts have subjected *Apprendi* claims to harmless and plain error review. As these courts have recognized, it is possible for a criminal defendant to have a fair and accurate trial without the new procedural protection offered by *Apprendi.* None of these

> cases have suggested that failure to submit the question of drug quantities to a jury is structural error. We do not suggest of course, that all structural errors satisfy *Teague's* second exception. We merely emphasize that finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively under *Teague.*

Sanders, 247 F.3d at 150-151 (citations omitted).

In *Buckland* the Ninth Circuit applied the plain error standard of review. 2000 WL 63718 p.5. Applying that standard, it held that Buckland "failed to show that the *Apprendi* sentencing error affected the outcome of these proceedings or requires resentencing, and we affirm his sentence of 324 months." *Id.* at p.11. Given this the court finds inescapable the conclusion that *Apprendi* does not meet the second *Teague* exception because it does not "alter our understanding of the bedrock elements essential to the fairness of a proceeding." *Sanders,* 247 F.3d at 150, quoting *Sawyer* 497 U.S. at 242. Thus, *Apprendi's* "new" rule may not be asserted by Plunk on collateral review.

B. Cause and prejudice.

(1) Cause.

In light of the foregoing discussion of retroactivity of *Apprendi,* the court could bypass the cause and prejudice issue. For the sake of completeness, however, the court will discuss the issue as if it were not moot. Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in a habeas only if the defendant can first demonstrate "cause" and "actual prejudice", or that he is actually innocent. *Bousley v. United*

States, 523 U.S. 614, 622 (1998). A demonstration of actual innocence is not at issue here.

Citing *McCleskey v.* Zant, 499 U.S. 467, 497 (1991) Plunk posits that he has met the cause prong of the cause and prejudice test because there was a "reasonable unavailability of the **legal** basis ... for a claim." (emphasis added). What *McCleskey* actually states is: "reasonable unavailability of the **factual** basis of the claim." (emphasis added). Regardless, the Supreme Court has held that a claim was not reasonably available to counsel because it is so novel, resulting in a petitioner having "cause" for failing to raise a claim. *Reed v. Ross,* 468 U.S. 1, 16 (1984). In *Reed* the defendant failed to challenge a jury instruction which shifted the burden of proof of malice to him. That instruction was grounded in a century of North Carolina law. Six years after the defendant's conviction the supreme Court decided *Mullaney v. Wilbur,* 421 U.S. 684 (1975) striking down as violative of due process the requirement that the defendant bear the burden of proving lack of malice. *Id.* at 7. *Reed* is of no avail to Plunk because the rule of *Apprendi* was not so remote as that which the petitioner in *Reed* sought to avail himself of. Rather, the court is persuaded by the following analysis from the seventh Circuit on this exact point in a case challenging his sentence under § 841 due to *Apprendi* error.

> Nonetheless, the lack of precedent for a position differs from "cause" for failing to make a legal argument. Indeed, even when the law is against a contention, a litigant must make the argument to preserve it for later consideration. See *Bousley v. United States,* 523 U.S. 614, 622—24, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); *Engle,* 456 U.S. at 130 n.35, 102 S.Ct. 1558 (that a legal argument would have been unpersuasive to a given court does not constitute

"cause" for failing to present that argument). "Cause" means some impediment, and Smith does not contend that any outside force impeded, his legal defense in 1992. (Nor does he contend that counsel was ineffective for failure to anticipate *Apprendi;* no such argument would be tenable.) The lack of *any* reasonable legal basis for a claim may constitute "cause", see *Reed v. Ross,* 468 U.S. 1, 16, 104 S.Ct. 2901, 82 L.Ed.2d 1, 16 (1984), **but the foundation for Apprendi was laid long before 1992.** Other defendants had been making *Apprendi—like* arguments ever since the sentencing Guidelines came into being, and in *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), the court addressed on the merits an argument along similar lines. Smith could have invoked the themes in *McMillan,* and for that matter *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), just as the Justices themselves did in *Apprendi.* See *Garrott v. United States,* No. 99—2921 (7th Cir. Jan. 30, 2001). Thus Smith has not established cause; and for the same reason that he could not show plain error (if that were the right standard) he cannot show prejudice either.

United States v. Smith, 241 F.3d 546, 548—549 (7th Cir. 2001). (emphasis added).

Smith's analysis carries the day. Plunk was convicted in 1996, approximately four years after Smith. Therefore, Plunk had even less "cause" than Smith for not making an *Apprendi* argument. Futility cannot constitute cause if it means simply that at claim was unacceptable to that

particular court at that particular time. *Bousley,* 523 U.S. at 623. Plunk has failed to show cause for his procedural default. To hold otherwise would allow new rules easily to defeat the test for "cause".

(2) Prejudice and the application of Buckland.

Next, the court considers the prejudice prong of the cause and prejudice test. This is not necessary since Plunk has failed to meet the cause prong of the two part test. For the sake of completeness, however, and so that *Buckland* case can be applied here, the court considers the prejudice prong. Plunk must establish "actual prejudice." According to the government's assessment of what Plunk's sentence would have been under the sentencing guidelines (which is disputed by Plunk), Plunk would have been sentenced for a total of 56 years. Given that there was at least one, and arguably two, *Apprendi* errors in this case *(See* discussion of Count 11 and Count 1 below), it is inescapable that if he had been sentenced only under the guidelines, as required by *Apprendi* and *Buckland,* he would have received a lesser sentence on at least one count. But having missed a chance at a lower sentence is not the test. *Buckland* teaches that in the § 841 context plain error under *Apprendi* is harmless if, when looking to the evidence regarding the quantity of drugs, it appears beyond all doubt that the error did not affect the outcome of the proceedings and did not affect the defendant's substantial rights. *Buckland,* 2002 WL 63718 p.[10]. While the court is left to wonder how the right to jury trial under the reasonable doubt standard can at once be violated and not be a violation of a substantial rights, this is the law of the Ninth Circuit and the court therefore applies it.

First, as to Count 11, the jury found Plunk guilty of knowingly and intentionally distributing "approximately 220 kilograms of cocaine". Plunk makes much of the use of the

word "approximately" in the jury instruction. But the government is correct that whatever the word approximately means in the lexicon of the English language, it certainly would not encompass a formulation that approximately 220 kilograms of cocaine could ever mean less than the five kilograms of cocaine needed to trigger § 841. Indeed, the jury in Plunk's case actually considered the quantity of the drugs; whereas in *Buckland* it did not. Moreover, the jury did so applying the beyond a reasonable doubt standard. The validity of the instruction is fortified because it coupled with the unchallenged evidence of quantity of 220 kilograms of cocaine from what was known as "the Booher distribution" which was the factual predicate for the Count 11.

While this may not have been an ideal or advisable way to word the jury instruction, under these circumstances it is fairly concluded that there was not *Apprendi* error.

At page 9 of his statement of further clarification Plunk continues: "the jury was specifically instructed as to the meaning of "approximate amount", that "[i]t is *not necessary* for the government *to prove the exact amount or precise amount of cocaine* alleged in the indictment". Rather than bolster Plunk's cause, this only goes to emphasize that there was indeed approximately 220 kilograms of cocaine that was the factual predicate for Count 11, and that the instruction was designed so that the jury would not get confused by a technicality. The evidence of quantity of approximately 220 kilograms of cocaine was unchallenged at trial. The issue before the jury was whether Plunk distributed the 220 kilograms of cocaine from what was known as "the Booher distribution". Where the error in question concerns a jury instruction the degree of prejudice required is measured asking "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' not merely whether the instruction is undesirable,

erroneous, or even universally condemned.'" *Frady,* 456 U.S. at 167. Even if the use of the word "approximately" in the jury instruction technically constituted *Apprendi* error, given the totality of the evidence at trial it appears beyond all doubt that such *Apprendi* error did not affect the outcome of the proceedings, and, accordingly, did not affect Plunk's substantial rights. *See Id.* at p.9-10.

Next, as in *Buckland,* other evidence regarding the quantity of cocaine attributable to Plunk for Count 11 makes it appear beyond all doubt that any *Apprendi* error in this case did not affect the outcome of the proceedings, and accordingly, did not affect Plunk's substantial rights. While the foregoing discussion of what was presented to the jury alone would be sufficiently reliable evidence of quantity, there is more. Additionally, at the imposition of sentence there was unchallenged evidence of the quantity of 220 kilograms of cocaine from "the Booher distribution" which was the factual predicate for the Count 11. *See* sentencing transcript of November 18, 1996, at docket No. 461 p.[94-95]. Thus, even assuming *Apprendi* error, Plunk's conviction for Count 11 lends itself to an analysis strikingly similar to that in *Buckland.* In *Buckland* the court found:

> ....The Presentence Report, unchallenged in this respect, reflects that on December 7, 1993, he had in his possession 449 grams of methamphetamine, on February 16, 1994, he had 200 grams, and February 24, 1994, an additional 100 grams. The total of these amounts alone—over 700 grams—exceeds the 500 gram trigger that produces a statutory maximum of life. Not only did Buckland fail to register an objection to these amounts, but in his formal "Objections to the Presentence Report and Government's Sentencing Memorandum" dated

April 29, 1999, and prepared for Buckland's third sentencing hearing, his counsel Mr. Obertz wrote. "Even assuming appropriate composition [of the various amounts claimed by his accomplices, the defendant asserts the appropriate guide lines calculation would be level 32 i.e. *1—3 kilograms* of methamphetamine." (emphasis added). Furthermore, the district court asked Buckland's attorneys at the beginning of *each* of the three sentencing hearing if they wanted an evidentiary hearing, and each time the response was negative.

As we said in United *States v. Romero—Rendon* "[t]he Sentencing Guidelines allow judges to rely at sentencing on any information ... so long as it has sufficient indicia of reliability to support its probable accuracy." 220 F.3d 1159, 1161—62 (9th Cir.), *cert. denied,* 531 U.S. 1043, 121 S.Ct. 640, 148 L.Ed.2d 546(2000) (citation omitted). We find such reliable indicia in this record. One kilogram of methamphetamine, of course, equals 1000 grams, twice the amount required under §841(b) (1) (A) (viii) to make Buckland eligible for a life sentence.

Thus, whether we look only at the unchallenged amount at methamphetamine taken from Buckland by the authorities, or only at the amount conceded by his attorney with respect to the testimony of the accomplice witnesses, it appears beyond all doubt that the *Apprendi* error in this case did not affect the outcome of the proceedings, and, accordingly, did not affect

Buckland's substantial rights.

Id. at p.10 (footnote omitted) (emphasis in original).

Similarly in Plunk's case, at sentencing Plunk objected vigorously to the quantities that the presentence report found he should be responsible for, but conceded that he should he held accountable for the 220 kilograms ("the Booher distribution") that formed the basis of Count 11. See sentencing transcript of November 18, 1996, at docket No. 461 p.94—95.[2] Thus, as with the defendant in *Buckland,* Plunk's counsel's concession is yet another basis upon which the court concludes that it appears beyond all doubt that the *Apprendi* error in this case did not affect outcome of the proceedings, and, accordingly, did not affect Plunk's substantial rights. *See Id.* at p.10.

In summary, there was no *Apprendi* error as to Count 11. Even if there was *Apprendi* error, either counsel's concession as to quantity, or the unchallenged evidence of the 220 kilogram quantity of cocaine of "the Booher distribution" are sufficient to show reliable evidence of quantity, so as not to affect the outcome of the proceedings and Plunk's substantial rights. See *Id.* at 9-10. Plunk has failed to meet the "prejudice prong" of the cause and prejudice test, and his life sentence under § 841 for Count 11 should stand.

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[2] Notably, the government's attachment "D" is a bit confusing since the pagination at the bottom of the attachment does not correspond to the actual pagination of the transcript. It is clear that the government meant to reference the actual transcript pagination.

There was not sufficiently reliable evidence of quantity as to Count 1. The government submits that it relies on concessions made by Plunk's counsel. These concessions were to the effect that there were was a conspiracy involving tons of cocaine. Plunk's defense was that he was not a part of said conspiracy. These so called "concessions" are far different than those made at sentencing regarding Count 11. Rather, they were part of a lawyer's argument to the jury, and are not of the same quality of those relied on by the Ninth Circuit in *Buckland.* Furthermore, the jury was not instructed to find a specific quantity of drugs as to Count 1. Finally, the government has not pointed to anything in the sentencing transcript which would link up a particular quantity of drugs with the conviction for Count 1. The court's reading of that transcript reveals that the trial judge found, after rejecting some of the amounts proposed in the presentence report and resolving any doubts in Plunk's favor, that Plunk was responsible for a total amount 2,426 kilograms. Yet no part of this amount was specifically linked up to Count 1. The jury acquitted Plunk on one count of distributing cocaine and hung on one count of distributing cocaine. On the record before it would require too much conjecture on the court's part to attribute the requisite amount of cocaine for a life sentence under § 841 as to Count 1. Hence, there was *Apprendi* error which may have affected the outcome of the proceedings and Plunk's substantial rights. As discussed *supra,* however, this is of no consequence because application of *Apprendi* is barred by the *Teague* doctrine, and Plunk has failed to show "cause" under the cause and prejudice test.

II
APPRENDI AND THE SENTENCING GUIDELINES

Plunk's *Apprendi* argument glides from § 841 arguments straight into Plunk's sentence adjustment for

obstruction of justice, which is governed by §3Cl.1 of the Sentencing Guidelines, as if there were no distinction between the two. There is. Long before *Apprendi* the Supreme Court held that the Sentencing Guidelines are constitutional. *Mistretta v. United States,* 488 U.S. 361 (1989). True, the issue presented in *Mistretta* involved separation of powers. Equally true is the point made by Justice Scalia in his dissenting opinion that "the modest name "Guidelines" .... have the force and effect of laws, prescribing the sentences criminal defendants are to receive." *Id.* at 413. There is, however, a fundamental distinction between the Sentencing Guidelines and the statutory scheme found at § 841.

Section 841(b) (1) (A)&(B) require a finding of fact(s) that increases the prescribed statutory maximum penalty to which a defendant is exposed and therefore such fact(s) must be presented to a jury and proven beyond a reasonable doubt. *Buckland,* 277 F.3d at 1182. The Sentencing Guidelines, on the other hand, do not increase the maximum penalties; rather they set forth a system for imposing sentences for statutory violations of the criminal law. Indeed, in *Buckland* the Ninth Circuit held that although the district court erred under *Apprendi,* in determining Buckland's 324 month sentence such error was harmless because (1) either the unchallenged amount of methamphetamine taken from Buckland by the authorities, or, the amount conceded by his attorney with respect to the testimony of accomplice witnesses, placed beyond all doubt that Buckland was eligible for a life sentence, and accordingly did not affect his substantial rights; and, (2) under a sentencing process known as "stacking", which took into account the manner in which the defendant committed his crimes, even if Buckland had been indicted only under 21 U.S.C. § 841(b)(l)(C), the Sentencing Guidelines would have required the trial judge to sentence him to 324 months

made up of consecutive sentences, each of which would not have exceeded the maximum term of imprisonment. *Id.*

There are several factually dependant provisions in the Guidelines, in that it allows a judge to make adjustments which increase or decrease sentences based upon his findings of fact regarding the conduct of defendants which is not part of the criminal charge. These include, for instance, §3El.1 for acceptance of responsibility, and §3C1.1 for obstruction or impeding of justice. Similar upward or downward sentencing departures exist, for example, at §3Bl.1 for an aggravating role in the offense, and 3B1.2 for a mitigating role in the offense. Some sentencing enhancements are quite specific, such as an increase by 3 levels if the offense of manufacturing, distributing, advertising, or possessing an eavesdropping device is done for pecuniary gain. *See* §2H3.2.

Nothing about the ability of the sentencing judge to increase or decrease the prescribed statutory penalties under the Guidelines is contrary to the prescripts of *Apprendi.* Indeed, the Guidelines codify the sort of sentencing discretion judges have traditionally had, thereby enabling them to fashion appropriate sentences to a given cases. It is beyond cavil that the court should have the ability to make a downward departure for the mitigating role for an offender who, for example, in the midst of a bank robbery that has begun to turn violent, stops his confederates from taking a hostage. It would be equally abhorrent to American jurisprudence if our sentencing scheme did not hold out the possibility that a truly remorseful defendant could not receive a downward adjustment for acceptance of responsibility. Finally, and most importantly, relying on Supreme Court precedent, the Ninth Circuit has already ruled on this exact 3Cl.l issue in the case of *United States v. Barbosa,* 906 F.2d 1366, 1369 (9th Cir. 1990).

> Barbosa first claims a "due process" sort of violation in the district court's consideration of his false testimony to increase his offense level. He notes that giving false testimony under oath would constitute violation of several federal laws and argues that allowing enhancement under the Guidelines for such acts essentially permits punishment for what amount to criminal violations without requiring the government to prove the elements beyond a reasonable doubt. We consider this argument to be foreclosed by the Supreme Court's decision in *United States v. Grayson,* 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1977). Holding that a sentencing judge, in fixing the sentence of a defendant within statutory limits, may consider the defendant's false testimony observed by the judge during the trial, the court dismissed Grayson's claim that such a practice constituted punishment for the crime of perjury, for which he had not been indicted, tried, or convicted by due process. *Id.* at 52, 98 S.Ct. at 2617. Rather, the Court stated, "it is proper — indeed, even necessary for the rational exercise of discretion — to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision." *Id.* at 53, 98 S.Ct. at 2617. The enactment of the Guidelines has not altered this analysis. See *United States v. Belgard,* 894 F.2d 1092, 1099 (9th Cir. 1990)

(emphasis added). More recently, the Ninth Circuit found that an *Apprendi* claim did not invalidate a sentence under

the guidelines so long as the district court in determining the sentence found no fact resulting in a penalty greater than the applicable statutory maximum. *Lewis,* 235 F.3d at 218-219. *Buckland* 277 F.3d at 1186 cements this rule. Hence, Plunk's *Apprendi* arguments as to the Sentencing Guidelines are without merit.

Finally, there is simply no merit to Plunk's other contentions regarding errors under the sentencing guidelines. *Buckland* also affirms the effect of stacking under U.S.S.G. §5G1.1(D) Therefore, even if there were *Apprendi* error the court would be required to impose a sentence of 56 years: 20 years on Count 1, 20 years on Count 11, and four years on each of the four telephone counts all to be served consecutively. The Court of Appeals has already affirmed Plunk's sentence thereby barring his arguments under the relitigation doctrine. *Pollizzi v. United States,* 550 F.2d 1133, 1135—1136 (9th Cir. 1976).

III
ISSUES CONCERNING THE TESTIMONY OF TIMOTHY PIERSON

Plunk's sentence was enhanced for obstruction of justice based on the testimony of Timothy Pierson. Pierson testified that Plunk had sworn a false affidavit and perjured himself at Pierson's own sentencing hearing when Plunk stated *inter alia* that Pierson did not know "there was cocaine on the trucks" and "was tricked" and did not join or know about the conspiracy until late November 1993. U.S. *v. Plunk,* 153 F.3d 1011, 1028 (9th Cir. 1998). The government contends this issue is barred by the relitigation doctrine *(See Polizzi* 550 F.2d at 1135-1136) because Plunk directly appealed this issue to the Ninth Circuit. *See Id.* There the court rejected Plunk's argument that the government failed to meet its obligation under *Brady v.*

Maryland, 373 U.S. 83 (1963) by not producing notes from the file of Pierson's attorney, which Plunk submitted could have substantially impeached Pierson. *Id.* This argument then, would be barred by the relitigation doctrine. *Polizzi,* 550 F.2d at 1135-1136. It does not appear, however, that this is the argument(s) Plunk now makes.

Here, Plunk submits that the government had a "secret vest pocket" deal with Pierson, which resulted in Pierson receiving a substantial reduction in his sentence (from 27 to 12 years) . Thus, Plunk continues, the subsequent enhancement of his sentence for obstruction of justice was done in violation of his rights to due process, effective assistance of counsel, to confrontation and cross—examination and to protection of an oath under the 5th, 6th and 14th amendments of the U.S. Constitution. The are many twists and turns within the several theoretical constructs Plunk puts forward. Indeed, it is as if the rambling choppy arguments were meant to guarantee that the court would inevitably misunderstand some part of Plunk's case thereby guaranteeing error. (See Appendix C pages 1—6).[3]

[3]Notably, the government previously moved for a conflict of interest hearing because Plunk's myriad of claims includes numerous ineffective assistance of counsel claims. The court had such a hearing on May 30, 2000, and determined that there did not appear to be a direct conflict of interest because most of these were not really alleged as ineffective assistance of counsel claims, but were somehow "backup" claims in case his other claims were not cognizable. Thus, throughout the course of this recommendation the court only discusses ineffective assistance of counsel where there is some conceivable way of finding that such a claim has in fact been made.

Before marching through any of these grounds on the merits, the court first determines whether the government is correct that the theory is: (1) barred by the relitigation doctrine; and, or (3) barred by procedural default. A petitioner may not create a different ground for relief merely by alleging different facts, asserting different legal theories, or couching his argument in different language. *Campbell v. Blodgett,* 997 F.2d 512, 518 (9th Cir. 1992). At first glance this would seem to apply to Plunk's "vest pocket" ground because it alleges different facts. These alleged facts, however, were not and could not have been known to Plunk at the time of his direct appeal. While it is true that identical grounds may be supported by different factual allegations and legal theories *(See Polizzi* 550 F.2d 1136), there is no authority for applying this rule to knew factual events. Here, instead of simply alleging new facts, Plunk maintains that a new factual event, Pierson's reduction in sentence, was coupled with an event previously unknowable (a secret deal). Furthermore, where doubts arise in a particular case as to whether two grounds are different or the same, they should be resolved in favor of the applicant. *Polizzi,* 550 F.2d 1136. Moreover, Pierson's sentence was not reduced until after Plunk's appeal of his conviction and sentence. "By "ground" we simply mean a sufficient legal basis for granting relief sought by the applicant." *Id.* Thus, the government's procedural default argument also fails because this ground could not have been raised on direct appeal.

Moving on to the merits of Plunk's new ground for relief, the court finds there are none. First, Plunk attacks Pierson's Rule 11 plea agreement on the grounds that it is coercive as being the only way for a defendant to escape draconian sentencing laws. As the government states, "Plunk apparently attempts to revive the short lived panel opinion of the 10th Circuit in *United States v. Singleton,* which briefly

outlawed the admission of testimony by individuals who were offered leniency from the government in exchange for their testimony". That case was reversed *en banc* in United *States v. Singleton,* 165 F.3d 1297 (10th Cir. 1999) *(en banc).* The Ninth Circuit has squarely rejected the reasoning of *Singleton I. United States v. Smith,* 196 F.3d 1034, 1038—1040 (9th Cir. 1999) That finding that a grant of immunity does not constitute a giving of something of value f or testimony in violation of 18 U.S.C. § 201(c) (2), is equally applicable here. The underpinning of *Smith* is that there is a long standing line of cases, including Supreme Court cases, upholding statutory incentives for cooperating witnesses, and the government's widespread, long standing practice of offering leniency for cooperating witnesses. *Id. Smith* and its predecessors do not offer any support to Plunk's contention that Rule 11 plea agreements are coercive. True, the government, as Plunk argues, "holds the keys" to escape from what he characterizes as draconian sentencing laws. But there is nothing new about this, save perhaps the fact drug crimes now receive stiffer sentences than they once did. As the Ninth Circuit noted in *Smith,* "The fact of a bargain, or of the hope or expectation of leniency, affects only the weight of the testimony, not its admissibility." *Id.,* at 1040 (citing *Darden v. United States,* 405 F.2d 1054, 1056 (9th Cir. 1969). Thus, this ground fails on its merits.

Next, Plunk's naked allegations of a "vest pocket deal" between the government and Pierson are not supported by the record. Indeed, the questions asked of Pierson and the answers given by him at sentencing show the opposite. Plunk has no basis in fact for making such allegations against the assistant United States Attorney who prosecuted the case. The Rule 35 motion brought by the government in this case was not exceptional. Furthermore, the fact that the trial judge was under the mistaken belief as to his ability

and/or intention to reduce Pierson's sentence is of no consequence. It is puzzling that Plunk would characterize the trial judge's words as an "affirmative misstatement". Regardless, this ground is without factual merit, and Plunk's conclusory statements are not enough to require a hearing. *United States v. Johnson,* 988 F.2d 941, 945 (9th Cir. 1993). Ergo, this ground fails on its merits.

As for the proverbial "kitchen sink" of other constitutional violations Plunk contends occurred regarding the Rule 11 plea agreement, they are equally without basis in law. Plunk's briefing makes absolutely no showing in law that Rule 11 plea agreement testimony is a basis for grounds claiming violations of equal protection, due process of law, "protection of an oath" (whatever that is), or the rights to jury trial, effective assistance of counsel, and "the right to separation of powers". To the extent any of these grounds are fairly raised here (and it appears that the broad concept of due process is the only one that may be) they are subsumed under *Smith* as discussed above. In short, the use of testimony from cooperating witnesses and alleged co—conspirators in exchange for or with the expectation of leniency is legitimate.

Finally, Plunk claims that some or all of these violations also occurred because the trial court denied him the right to present testimony from an "expert witness" regarding the motive for bias of a co—defendant witness in a federal case involving draconian mandatory minimum sentences. The government did not respond to this argument, but it is easy to see how it might have been missed in the confusion. First, it strikes the court that the argument is facially without merit. It is the job of the attorneys to elicit testimony from the witness and argue this sort of point to the fact finder. There is no such thing as "expert" testimony on the motive to avoid prison time, just as there is no "expert"

on the subject of any witness perjuring himself. It is an obvious question of fact. Secondly, this ground was not taken up on direct appeal. Therefore, Plunk must show cause for not doing so, and that prejudice would result if his allegations were proven true. *United States v. Mejia—Mesa,* 153 F.3d 925, 929 (9th Cir. 1998). He has done neither. Therefore, the claim is barred by procedural default.

IV
DOUBLE JEOPARDY, DUE PROCESS, PROHIBITION AGAINST PUNITIVE TAKING OF PROPERTY, AND INEFFECTIVE ASSISTANCE OF COUNSEL GROUNDS RELATING TO CIVIL FORFEITURES

The government, pursuant to 21 *U.S.C.* § 841, brought civil forfeiture proceedings based on the same set of facts and offenses as those that were the bases of the criminal charges filed against Plunk. Plunk claims that the government's "tactical prosecution on two fronts constitutes a violation of the constitutional prohibition against double jeopardy, due process, and protection against the punitive taking of property."

A. Double Jeopardy

First, the court dispenses with the government's contention that Plunk's double jeopardy claim is not properly brought in his § 2255 motion because it cannot be used to attack claimed violations of law in a civil forfeiture proceeding where custody is not at issue. *United States v. Kramer,* 1129, 1130 (9th Cir. 1999). While the government's statement of the law is correct, its application to the instant case is partially overstated. Custody is at issue in this case. Thus, while the government is correct that the items in Appendix B of Plunk's motion are not properly construed as part of Plunk's motion, this must be

distinguished from looking to Exhibit B for judicial notice of an otherwise permissible ground for relief under §2255, such as subjection to double jeopardy and a violation of due process rights resulting from the civil forfeiture proceedings in question. This, then, is what the court understands to be the role of Exhibit B and the nature of Plunk's claims.

Regardless, the government is correct that Plunk's double jeopardy grounds are barred by the relitigation doctrine. Plunk contends that the constitutional prohibition against double jeopardy was violated because the forfeitures were punitive as being "factually, tactically, statutorily in personam under *United States v. Usery,* 518 U.S. 267 (1996) ." The Ninth Circuit twice addressed Plunk's double jeopardy argument, once on interlocutory appeal by the government *(Plunk I),* and once on direct appeal by Plunk. *United States v. Plunk,* 153 F.3d loll, 1029-103 0 (9th Cir. 1998). In his direct appeal the Ninth Circuit squarely held, as it did in *Plunk I,* that the Supreme Court's holding in *United States v. Ursery,* 518 U.S. 267 (1996) (which was handed down one month after *Plunk I)* was in no way contrary to the Ninth Circuit's holding in *Plunk I. Id.* The court stated:

> *Plunk I* was decided on the ground that Plunk's failure to "assert any claim to the seized property," as authorized by 19 U.S.C. § 1608, deprived him of "any right he had to" it. *Plunk I,* 1995 WL 619299, at *1. This, in turn, defeated any claim under the Double Jeopardy Clause. *See Id. Ursery* neither spoke to this issue, nor did its holding affect it. Under well established law—of—the—case doctrine, we therefore may not revisit Plunk's double jeopardy claim. See *Kimbal,* 590 F.2d at 772.

The government submits that: "It is black letter law

that issues previously determined on the merits on direct appeal are barred from re-litigation under § 2255." For this the government cites *Polizzi v. United States,* 550 F.2d 1133, 1135-1136 (9th Cir. 1976). This is not, strictly speaking, correct. *Polizzi,* specifically instructs:

> Although principles of *res judicata* do not bar a prisoner from relitigating on habeas corpus or under § 2255 or on coram nobis issues raised in the original appeal, a district court may refuse to entertain a repetitive petition absent a showing of manifest injustice or a change in law.

While not the "black letter law" the government contends it is, the rule of *Polizzi* carries the day for the government on the double jeopardy issue. There has been no change in the law that would alter either *Plunk I* or *Plunk II* on the issue of the forfeiture proceedings being violative of the prohibition against double jeopardy. Nor, has a showing of manifest injustice been made. Rather, on this score Plunk simply seeks another bite at the proverbial "apple" on issues that have already been decided against him. Ergo, the court should exercise its discretion and refuse to consider the merits of this double jeopardy ground for relief.

B. PROTECTION AGAINST PUNITIVE TAKING OF PROPERTY

Next, the court addresses what Plunk refers to as "... his right to be free from the punitive taking of property. This argument seems to hover somewhere between his double jeopardy argument ("A." above) and his due process argument ("C." below). But the simple fact of the matter is that the question of a punitive taking of Plunk's property was part and parcel of his appeals in *Plunk I* and *Plunk II* discussed under "A." above. Plunk has given absolutely no

basis in law or reason for this separate and cryptic so called "punitive taking of property" ground for relief. To the extent it is pertinent, it will be discussed under "C." below. Otherwise the court should exercise its discretion and refuse to consider the merits of the dubious ground for relief. *See Polizzi,* 550 F.2d at 1135—1136.

C. DUE PROCESS

Plunk also contends that he was denied due process of law due to the forfeiture proceedings because the government made a tactical choice to take his property thereby forcing him to forego a defense to the proceedings in order to preserve his Fifth Amendment privilege against self incrimination. He posits that the Ninth Circuit's rejection of his double jeopardy argument fails to appreciate the true situation he was placed in by the government. Specifically, that he and his counsel were presented with a "Hobson's choice" by forcing to fight simultaneously on two fronts because a property owner claiming incriminating property in an administrative forfeiture proceeding is left with no Fifth Amendment protection.

This argument is incorrect. In *Plunk I* the Ninth Circuit squarely rejected this theory relying on *United States v. Cretacci,* 62 F.3d 307, 311 (9th Cir. 1995). In *Cretacci,* the court teaches:

> Finally, we reject the argument that by requiring a defendant to claim his property we force him to sacrifice his right against self—incrimination in order to preserve his right against Double Jeopardy. At some point, a defendant who seeks to prove that a prior forfeiture "punished" him would have to claim that he owned the forfeited property. The effect of our rule is only to

> required that such a claim be asserted in the civil forfeiture proceeding itself and not simply in the motion to dismiss the criminal indictment. **Moreover, a defendant does not risk incriminating himself by claiming that he owns property that is subject to a forfeiture. A defendant's claim of ownership at a pretrial suppression hearing of property that he contends was unlawfully seized may not be used to prove the defendant's guilt.** *Simmons v. United States,* 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). **For the same reason, a defendant's claim of ownership of property that was subject to forfeiture may not be used for that purpose.** As the Supreme Court has explained, it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* (holding that a defendant's assertion of ownership in seized property at a pre—trial suppression motion could not later be used against him to prove quilt).

(Emphasis added). As for Plunk's contention *(See* Appendix C p.10) that *Simmons* as discussed in *Cretacci* and is cannot be applied retroactively, and that his voluntary abandonment of property was based on the "old law". Lost on Plunk is that the rule of *Simmons* has been the law of the land since 1968. only thing new is its application to civil forfeiture cases in *Cretacci.* But the law was there long before civil proceedings were instituted against him.

In the instant case, Plunk's tangled briefing urges that he has formulated a new theory. That theory includes essentially a mix of all his grounds related to civil forfeiture and argues that the government, relying on then existing case

law, statutory law, and constitutional law, utilized a "calculated and tactical result—oriented forfeiture" thereby making a "strategic choice" to force Plunk to fight on two fronts. There is nothing new about Plunk's arguments. Once one untangles them it is obvious that they are the same now as they were in *Plunk I* and *Plunk II.* As the government aptly points out: "A petitioner may not create a different ground merely by alleging different facts, asserting different legal theories, or couching his argument in different language." *Campbell v. Blodgett,* 997 F.2d 512, 518 (9th Cir. 1992) *citing Sanders v. United States,* 373 U.s. 1, 16 (1963). The court is not persuaded by Plunk's attempt to recast his forfeiture arguments as if they constituted some novel theory. They do not, and his due process ground is properly barred from consideration on the merits. *Polizzi,* 550 F.2d at 1135—1136.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Through reading in combination his motion, statement of clarification, and his briefing, the court understands that Plunk has also engineered into his case a cryptic ground of being denied his right to effective assistance of counsel. (See p.19 of Plunk's reply). Apparently, Plunk reasons that by being denied the other previously discussed rights, he was denied his right to effective assistance to counsel because his counsel was not able to secure/protect those rights due to forfeiture procedures. Regardless of exact contours of this indecipherable argument, there is simply no basis in law for grounding an ineffective assistance of counsel theory on the facts presented. As discussed above the forfeiture proceedings were twice found valid by the Ninth Circuit and they did not violate Plunk's due process rights. In sum, his ineffective assistance of counsel argument is wholly without merit.

V
THE DOWNWARD DEPARTURE FOR SENTENCING DISPARITY ISSUE

Completely absent from the morass of his motion and "statement of further clarification", in his responsive brief, for the first time, Plunk also claims that the trial judge erred in not considering a downward departure in his sentence on the grounds of sentencing disparity. Although it ultimately fails as being procedurally barred, this argument has some merit. The government does not dispute that at the time of Plunk's sentencing the state of the law was such that the trial judge did not appreciate that he had the authority to depart downward based on sentencing disparity. The trial judge looked to the case of *United States v. Mejia,* 953 F.2d 461 (9th Cir. 1992) and held that notwithstanding Plunk's argument that the legal landscape had changed under *Koon v. United States,* 518 U.S. 81, 113, 116 (1996) he was without the power to grant such a downward departure. Subsequently, the Ninth Circuit instructed: "Downward departure to equalize sentencing disparity is a proper ground for departure under the appropriate circumstances." *United States v. Daas*, 198 F.3d 1167, 1180—1181 (9th Cir. 1999). The failure to make such a determination is error that calls for the trial court to revisit the sentence and make findings of whether such a downward departure is appropriate. Id. at 1181.

The government's response urges that the merits of the issue are not to be considered because Plunk did not raise the issue on direct appeal. While acknowledging possible exceptions to the rule which do not apply here, the Ninth Circuit is clear that:

We therefore conclude that this court follows the

> rule that nonconstitutional sentencing errors that have not been raised on direct appeal have been waived and generally may not be reviewed by way of 28 U.S.C. § 2255.

U.S. v. Schlesinger, 49 F.3d 483, 485 (9th Cir. 1994). "We have consistently held that a § 2255 petitioner cannot challenge nonconstitutional sentencing errors if such errors were not challenged in an earlier proceeding." *United States v. McMullen,* 98 F.3d 1155, 1157 (9th Cir. 1996). This means either on direct appeal or before the trial court with a proper contemporaneous motion made, for instance, pursuant to Fed.R.Crim.P. 35 or 36. *Schlesinger,* 49 F.3d at 485-486. There is no accounting for why Plunk's appeal did not raise this issue. Perhaps it was simply forgotten in what the Ninth Circuit court of Appeals referred to as a "scattershot approach". Plunk, through his counsel, submits that he did raise the issue before the trial court both orally and in a Rule 35 motion. The oral argument at sentencing is not pertinent to the rule of *Schlesinger.* As for the Rule 35 motion, the court was prepared to accept this representation until it noticed footnote 1 of the government's response brief at docket No. 578. There the government stated that Plunk did not attach a copy of said motion to his brief, and that the government does not know what Rule 35 motion Plunk is referring to. Plunk also made much of the Rule 35 motion in his supplemental brief. (Docket No. 597 pages 68-77). The court took the time to go to the docket sheet and then to the file. Sure enough, there was a Rule 35 motion at docket No. 430 and a motion for reconsideration of said motion at docket No. 436. These pleadings, however, had nothing to do with a downward departure for disparity in sentencing. Rather, they related to the previously discussed 3C1.1 upward adjustment for obstruction of justice. Ergo, Daas is inapposite.

The government is therefore correct that Plunk is procedurally barred from raising the issue now. First, Plunk has made absolutely no showing of cause under the "cause and prejudice" test. *See United States v. Mejia-Mesa,* 153 F.3d 925, 928 (9th Cir. 1998). Additionally, Plunk makes no showing whatsoever that Plunk would likely obtain a downward departure based sentencing disparity. *Id.* at 929. Indeed, as the government points out, the trial judge's statements appear to be the opposite, since he noted that the only co-conspirator the court believed whose actions were similar to Plunk's was Pierson's, and the court sentenced him, at that time to a term of 324 months.[4]

Finally, Plunk may attempt to transubstantiate this issue into one of his catch all "ineffective assistance of counsel" claims. To prevail on an ineffective assistance of counsel claim the elements are: (1) the defendant must show that counsel's representations fell below an objective standard of reasonableness; (2) the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *United States v. McMullen,* 98 F.3d 1155, 1157 (9th Cir. 1996). For the same reasons that he failed to meet the prejudice prong of the cause and prejudice test, Plunk has made no showing that there is a "reasonable probability" he would receive a downward departure based on disparate sentencing. *A fortiori,* an ineffective assistance of counsel claim also fails.

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[4]Also well taken is the government's point that the fact that the court later reduce Pierson's sentence pursuant to a Rule 35 Motion for substantial assistance has no bearing on a comparison that would have been made at the time of Plunk's sentencing.

VI

PLUNK'S DOUBLE JEOPARDY AND MERGER THEORIES RELATED TO HIS BEING SENTENCED FOR VIOLATION OF 21 U.S.C. § 841(a) (1) ON AN AIDER AND ABETTOR THEORY AND VIOLATION FO 21 U.S.C. § 841(a)(1) AND § 846 FOR CONSPIRACY

Plunk was convicted in Count 11 of a violation of 21 U.S.C. § 841(a) (1) as to a distribution by Hal Booher on December 12, 1993 as an aider and abettor, and a violation of 21 U.S.C. § 841(a) (1) and 846 for conspiracy to commit a section 841(a) (1) offense (the Count 11 distribution). The jury hung or acquitted on all other counts. The conspiracy statute states: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846. 18 U.S.C. § 2(a) states: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal".

In his "statement of further clarification" Plunk posits that: "Under the doctrine of double jeopardy and merger, given the government's factual theory of the case, the indictment and court's instructions, and the jury finding, acquittal and hung status, i.e. that Mr. Plunk was guilty of the Count 11 Hal Booher distribution by instructing Mr. Booher and agreeing to assist him, in committing the distribution conduct, Mr. Plunk of necessity was guilty of conspiracy and these two crimes should be merged and only one conviction and imposition of sentence can stand based on the defendant's right to be free from double jeopardy under the United States constitution." Plunk continues: "Under the government's factual theory, and the court's

instructions, and jury verdict, the acts alleged to constitute conspiracy to distribute are not distinct from the acts alleged to constitute the aiding and abetting of the distribution." Accordingly, Plunk submits he has been unconstitutionally punished twice for the same acts. The two crimes, he urges, "should merge and the court should only be allowed to impose one sentence based on the same underlying facts."

The government presents two Supreme Court cases which squarely foreclose this argument. Quite succinctly, under United *States v. Powell,* 469 U.S. 57, 64—65 (1984), the defendant cannot attack his conviction based on alleged inconsistent verdicts. Prosecution of a defendant for conspiracy, where certain of the overt acts relied upon by the government are based on substantive offenses for which the defendant has been previously convicted, does not violate the Double Jeopardy Clause. *United States v. Felix,* 503 U.S. 378, 380—381 (1992). Plunk offers no response to the these cases. Indeed, his opposition brief does not even confront the issue. Presumably, this is because he has no response, but the court does not presume he is abandoning his claim. Regardless, the government's cases are directly on point and these grounds fail Plunk.

VII
DETECTIVE SPEZIALE'S TESTIMONY

Plunk argues that his rights under the Fifth, Sixth, and Fourteenth Amendments were violated by allowing Detective Speziale to testify "under the guise of being an 'expert'". The trial judge allowed Detective Speziale's testimony to be presented as "expert". This issue was taken up on direct appeal. *See Plunk,* 153 F.3d at 1016-1017. Therefore, the government argues, the case is barred by the relitigation doctrine. *Polizzi,* 550 F.2d at 1135—1136.

First, Plunk counter argues that he is not required to show cause and prejudice in order to assert constitutional claims concerning "expert" testimony because these claims were in fact asserted on direct appeal. For this he cites the court to pages 27-37 Exhibit G (his Ninth Circuit brief). But it is only pages 27 through 30 of Exhibit G which actually deal with Detective Speziale's testimony. After that other issues are briefed. Moreover, pages 27-30 of Exhibit G and the Ninth Circuit's decision do not reveal any briefing or consideration of constitutional issues. Rather, they show that the government is correct that Detective Speziale's testimony only raised evidentiary issues concerning the admissibility of expert testimony, and Plunk's present statement of constitutional claims are wholly conclusory. These evidentiary issues are not of constitutional dimension; rather, they involve the court's role as gatekeeper of such evidence. *See Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1998); *Daubert v. Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993); *United States v. Hankey,* 203 F.3d 1160 (9th Cir. 2000). Claims of error that are not of a constitutional magnitude will not sound in § 2255 petitions unless they involve a complete miscarriage of justice. *United States v. Addonizio,* 442 U.S. 178, 186—187 (1979). Ergo, contrary to Plunk's argument, the cause and prejudice test is not at issue, and the relitigation doctrine bars his claims concerning Detective Speziale. Plunk's position is that this issue is not barred by the relitigation doctrine because new law has overruled the Ninth Circuit's decision in *Plunk II.* As will be seen below, this is not correct, and it is noteworthy that one of the very cases Plunk cites is squarely against him. Plunk relies on a change in law subsequent to the Ninth Circuit's holding in his case. That is the case of *Kumho Tire Co., v. Carmichael,* 526 U.S. 137 (1999). There the Supreme Court teaches that the *Daubert* factors are not limited to "scientific" testimony, but to all expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579

(1993). However, Plunk also relies on *United States v. Hankey,* 203 F.3d 1160, 1168-1169 (9th Cir. 2000) where the Ninth Circuit teaches that "far from requiring trial judges to mechanically apply the *Daubert* factors-or something like them-to both scientific and non-scientific testimony, *Kumho Tire* heavily emphasizes that judges are entitled to broad discretion when discharging their gatekeeping functions." *Id.* at 1168. "The *Daubert* factors were not meant to be exhaustive nor to apply in every case." *Id.* Indeed, *Hankey* involved "expert" testimony similar to that given in *Plunk.* There, a police officer testified as an expert of gangs. "Certainly the officer relied on "street intelligence" for his opinions about gang membership and tenets." *Id.* At 1169. On this score, it is particularly interesting that Plunk cites the court specifically to footnote 7 of *Hankey.* There the Ninth Circuit notes:

> A number of Ninth Circuit cases have held that *Daubert* does not apply to "non—scientific" testimony at all. *See United States v. Plunk,* 153 F.3d 1011, 1017 (9th Cir. 1998); *McKendall v. Crown Control Corp.,* 122 F.3d 803, 806 (9th Cir. 1997); *United States v. Webb,* 115 F.3d 711, ~716 (9th Cir. 1997). To this extent, these cases are no longer good law after *Kumho Tire,* which eliminated the analytical distinction between "scientific" and "nonscientific" testimony. **However, these cases are still good law to the extent that they permit the admission of expert testimony on the basis of the expert's 'knowledge, skill, experience, training or education," which is consistent with Kumho Tire.**

(emphasis supplied). This makes what the trial judge did in Plunk's case "good law" post *Kumho Tire.* Thus, for all the

foregoing reasons attacking the trial court's allowing of Detective Speziale's "expert" testimony is of no avail to Plunk.

VIII
PLUNK'S FOURTH AMENDMENT GROUNDS

On direct appeal, Plunk litigated the Fourth Amendment issues he now raises regarding search warrants and wire taps. The Ninth Circuit decided against him on these matters in an unpublished decision. The government urges several reasons why his instant grounds are not cognizable. First, under *Stone v. Powell,* 428 U.S. 465, 469 (1976) Fourth Amendment claims are not cognizable in § 2255 motions if the prisoner had a full and fair opportunity to litigate them on appeal. Plunk claims this rule is only one of comity to states. But this is disingenuous, because conspicuously absent from his opposition is a response to the other cases cited by the government which belie his position. *See United States v. Hearst,* 638 F.2d 1190, 1196 (9th Cir. 1980), *cart denied,* 451 U.S. 938 (1981); *United States v. Cook,* 997 F.2d 1312, 1317 (10th Cir. 1993) (following *Hearst).*

Plunk, however, also contends that he was not given a full and fair opportunity to litigate these issues on direct appeal. Instead, he argues, that "despite appropriate pre-trial requests for information relating to the predicate warrants and/or motions to suppress as to same, the court did not order appropriate mandatory disclosure of same by the government and the government did not provide such appropriate information. This in turn impacted not only his Fourth Amendment rights, but his Fifth and Fourteenth (due process) rights to assert same and Sixth Amendment (right to counsel) as to assistance therein." This is a specious argument. Plunk made requests pre—trial and they were

denied and the government allegedly did not provide certain information which Plunk does not even describe. If it occurred pre—trial then there was a full and fair opportunity to litigate the matter. This has all the earmarks of a fishing expedition. Thus, this Fourth Amendment argument, including the attendant Fifth Amendment and Fourteenth Amendment arguments, are without merit.

The government is also correct that these grounds are precluded either by the relitigation doctrine or, alternatively, procedural default. The fact is that these issues were fully and fairly litigated and are therefore not cognizable in this § 2255 motion. *Polizzi,* 550 F.2d 1135—1136. If, as Plunk contends these grounds were somehow not fully and fairly litigated, he has failed to show cause and prejudice for his failure to do so, thereby barring them by procedural default. *Mejia-Mesa,* 153 F.3d at 928—929.

IX
JURY INSTRUCTION ERROR

Lastly, the court addresses Plunk's claim that the court erred by failing to give an instruction to the jury that their verdict had to be unanimous on acquittal or conviction of the greater offense of continuing criminal enterprise before deliberating on the lesser included offense of conspiracy. The government counters, and Plunk concedes, that Plunk raised this issue on direct appeal. Now, however, he posits that he is entitled to yet another bite at the proverbial "apple" (he argued the matter at the district court level as well) because the Ninth Circuit "did not address this issue except to state that the instruction was not requested in time." On this score, Plunk continues, that "structural, plain error would apply, and no request would be necessary." These arguments constitute non— sequiturs. The fact is that this issue was fully and fairly litigated and is therefore not

cognizable in this § 2255 motion. *Polizzi,* 550 F.2d 1135-1136. If, as Plunk contends these grounds were somehow not fully and fairly litigated, he has failed to show cause and prejudice for his failure to do so, thereby barring them by procedural default. *Mejia-Mesa,* 153 F.3d at 928-929.

Finally, Plunk submits: "Moreover to the extent that the instruction was not requested at the proper time, Mr. Plunk is entitled to a hearing on ineffective assistance of counsel in that regard." To prevail on an ineffective assistance of counsel claim the elements are: (1) the defendant must show that counsel's representations fell below an objective standard of reasonableness; (2) the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *United States v. McMullen,* 98 F.3d 1155, 1157 (9th Cir. 1996). Regardless of how one might view the facts as they relate to the first element, there is nothing to indicate that but for the lack of the jury instruction the outcome of the proceeding would have been different. Nor has Plunk made a *prima facie* showing that a hearing is warranted on the ineffective assistance of counsel issue. Thus, the claim that there was jury instruction -error is not cognizable and is of no avail to Plunk.

CONCLUSION

For the foregoing reasons it is hereby recommended that the Plunk's motion vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (Docket No. 539) be **DENIED.** It is further recommended that the government's request for dismissal for failure to meet or address the court's orders and rules of jurisdiction and procedural default (which was part of the government's opposition brief and tracked by the Clerk as a separate motion at Docket No.

558) be **DENIED as moot** since it is subsumed in the disposition of the motion at docket No 539.

DATED at Anchorage, Alaska, this 5th day of March, 2002.

/s/
United States Magistrate Judge
[John D. Roberts]

Pursuant to Local Magistrate Rule 12(C), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court by the close of business **March 27, 2002. The failure to object to a** magistrate judge's findings of fact may be treated as a procedural default and waiver of the right to contest those findings on appeal. McCall v. Andrus, 628 F.2d 1185, 1187—1189 (9th Cir.), cert. denied, 450 U.S. 996 (1981). The Ninth Circuit concludes that a district court is not required to consider evidence introduced for the first time in a party's objection to a magistrate judge's recommendation United States v. Howell, 231 F.3d 615 (9th Cir. 2000). **Because of the large number of issues addressed in the report and recommendations the number of pages allowed for objections and responses is more than the usual number. The court will not entertain any motion to increase this** number. objections and responses shall not exceed **fifteen (15) pages** in length, and shall not merely reargue positions presented in motion papers. Rather, objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed by the close of business **April 5, 2002.** The parties shall otherwise comply with provisions of Local Rule 12(C).

Reports and recommendations are not appealable

orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. See Hilliard v. Kincheloe, 796 F.2d 308 (9th Cir. 1986).

FILED
NOV 17 1994

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By:_____/S/_____ Deputy

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	) Case No. A94-036 CR
	) (JWS)
Plaintiff,	)
	)
v.	) ORDER FROM
	) CHAMBERS
GERALD FRANK PLUNK, et al.,	) (Motion to Dismiss -
	) Docket 185)
	)
Defendant.	)
	)

MOTION PENDING

Defendant Gerald Frank Plunk ("Plunk") filed a motion at docket 185 requesting dismissal of all charges in the superseding indictment against Plunk on the grounds that his prosecution would violate the Double Jeopardy Clause of the Fifth Amendment. The motion does not involve Plunk's co-defendant, Timothy Pierson ("Pierson"). Magistrate

Judge John Roberts, to whom the motion was referred for a report and recommendation pursuant to Local Magistrate Rule 4, has recommended that the motion be granted. This court reviews de novo.[2]

PROCEDURAL POSTURE

Plunk and Pierson were to have been tried on October 31, 1994. Plunk filed his double jeopardy motion on October 26, 1994.[3] No matter how this court may decide the double jeopardy motion, trial as to Plunk should not proceed until after the completion of an expedited review in the Court of Appeals. See Abney v. United States, 431 U.S. 651, 662 N.8 (1977). Trial in this case is expected to take several weeks and will involve many witnesses who must be transported to Alaska from as far away as the East Coast. The interest in trying Plunk and Pierson in a single trial is especially strong.

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[2]Ordinarily, in this District, following an initial report and recommendation from a magistrate judge, the parties have an opportunity to file objections and responses to objections which are considered by the magistrate judge before he or she issues a final report and recommendation. Here the requirement for expedited pre-trial review in the Court of Appeals, United States v. Abney, 431 U.S. 651, 662 n.8 (1977), and the time constraints of the Speedy Trial Act, 18 U.S.C. § 3161 et seq., have required this court to consider the objections and responses as part of its de novo review without a final report and recommendation from the magistrate judge.

[3]Plunk's counsel cannot be seriously faulted for filing the motion late, because it is based upon an evolving area of the law which is only now coming to the attention of counsel. Indeed, were the potential double jeopardy ramifications of civil forfeitures apparent earlier, it is highly unlikely the government would have risked its prosecution of Plunk on charges which could produce a term of incarceration exceeding 30 years and a fine of up to $4,000,000 in order to secure administrative forfeitures of chattels whose combined estimated worth is less than $16,170.

Following a conference with counsel and a hearing on the record, the trial date for both defendants was continued until January 3,1995. Application of the Speedy Trial Act makes it virtually impossible to delay Pierson's trial beyond that date. This court set a briefing schedule allowing for the entry of this order no later than November 17, 1994, which should afford enough time for expedited appellate review. See United States v. Miranda-Parra, 637 F.2d 610 (9th Cir. 1980) (expedited double jeopardy appeal decided in 32 days). It is hoped that the appeal will be decided in time to allow a single trial to proceed on January 3, 1995.

BACKGROUND

On March 22, 1994, a one-count indictment charging Plunk with conspiracy to distribute cocaine in Alaska from the "Fall of 1987 until no later than April, 1991" in violation of 21 U.S.C. §§ 841(a)(1) and 846 (the "Alaska I conspiracy") was returned. Plunk was arrested on March 25, 1994. On April 26, 1994 a superseding indictment was filed.

The superseding indictment contains 12 counts: Count 1 charges Plunk and Pierson with conspiracy to transport cocaine shipped from Columbia [sic] across the "Lower 48" states of the Union from April 1, 1993, until December 31, 1993 in violation of 21 U.S.C. §§ 841(a)(1) and 846 (the "Lower 48" conspiracy). Count 2 charges Plunk with engaging in a continuing criminal enterprise from about April 1993 through December 1993 in violation of 21 U.S.C. § 848. Counts 3 through 6 charge Plunk with using a communications facility to facilitate drug trafficking in violation of 21 U.S.C. § 843(b). Counts 7 and 8 charge Pierson with violating 21 U.S.C. § 843(b). Counts 9 through 11 charge Plunk with possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Count 12 charges Plunk with conspiracy to distribute cocaine in

Alaska from the Fall of 1980 until December 31, 1993 (the "Alaska II" conspiracy).

In the meantime, agents of the Drug Enforcement Administration ("DEA") seized certain items or personal property pursuant to 21 U.S.C. § 881, which were later declared forfeit to the United States pursuant to 19 U.S.C. § 1609 as follows: On March 25, 1994, a Rolex wristwatch valued at $1,500 was the subject of Seizure # 152090 and declared forfeit on June 3, 1994. On March 24, 1994, assorted firearms valued at $4,040 were the subject of Seizure # 152183 and declared forfeit on June 10, 1994. On March 24, 1994, currency in the amount of $9,660 was the subject of Seizure # 152199 and declared forfeit on June 24, 1994. On March 24, 1994, three small bags of placer gold valued at $967.89 were the subject of Seizure # 152824 and declared forfeit on August 24, 1994.

The declarations of forfeiture all identify Plunk as the property's owner at the time of seizure.[4] Further, as the notices of seizure state, all the property was seized "because it was used or acquired as a result of a drug-related offense." All of the property, save the Rolex, was found at Plunk's residence on March 24, 1994, when officers executed a search warrant. The Rolex was taken from Plunk when he was arrested on March 25, 1994. According to the Declaration of William J. Snider, Forfeiture Counsel of DEA, each of the above four seizures was accepted for administrative forfeiture based upon an evaluation process described in his declaration.

An additional forfeiture proceeding involving Plunk's property is pending. On September 8, 1994, the government

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[4]Plunk did not contest the forfeitures. His briefing indicates that the decision not to file a claim to the property was made in order to preserve his Fifth Amendment right not to testify.

filed its complaint in United States v. Four Aircraft, Case No. A94-401 CIV (JKS). The case is before Judge Singleton of this District. There, the Government seeks forfeiture of four aircraft registered to Plunk on the grounds that they are "property or proceeds traceable to an exchange for controlled substances in violation of 21 U.S.C. § 801 et seq."[4] According to the Government, "The facts and circumstances supporting the seizure and forfeiture of the defendant aircraft and parts are contained in (the attached) Affidavit of Special Agent Robert E. Cayford of [DEA].[5] On September 23, 1994, Plunk filed a claim in the action asserting ownership of the four planes.

On October 27, 1994, the Government moved to stay, or alternatively, to dismiss Four Aircraft pending disposition of its request for en banc reconsideration of the decision by the Court of Appeals for the Ninth Circuit in United States v. $405,089.23, 33 F.3d 1210 (9th Cir. 1994). The general averment that the forfeiture of the four aircraft is based upon the violation of 21 U.S.C. § 801 et seq., coupled with the information in the September 8, 1994, affidavit of DEA Special Agent Robert Cayford which is incorporated into the complaint by reference, indicates that the forfeiture of the aircraft is sought on the basis of Plunk's participation in the Alaska conspiracies and the Lower 48 conspiracy as well as upon possession of cocaine with intent to distribute. In the motion for stay, the Government represented that the charges in the instant criminal prosecution are the same violations underpinning the civil forfeiture sought in Four Aircraft.

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[4] Verified Complaint For Forfeiture at ¶ 1, Case No. A94-401 CIV (JKS).

[5] Id. at ¶ 9. The facts and circumstances recounted by Mr. Cayford include alleged transactions which form part of each of the two alleged conspiracies.

On November 16, 1994, Judge Singleton issued an order which stayed further proceedings in Four Aircraft pending the outcome of all criminal prosecutions of Plunk. Obviously, Judge Singleton found this course of action more appropriate than either staying the matter pending disposition of the en banc request in $405,089.23, 33 F.3d at 1210, or dismissing the civil forfeiture action without prejudice as requested by the Government.

Given the stay in Four Aircraft, this court concludes that Plunk has not yet been punished in the judicial forfeiture and that he is not presently subject to the burden of defending multiple proceedings asserting commission of the same offenses. For these reasons the continued prosecution of Plunk on the charges in the superseding indictment is not foreclosed on double jeopardy grounds by the judicial forfeiture action in Four Aircraft. See North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

DISCUSSION

The magistrate judge recommended that Plunk's double jeopardy motion be granted at docket 208. Based upon this court's de novo review, with the exception of the implied finding of fact and related conclusion of law that the administrative forfeitures are based upon all the same offenses as those with which Plunk is charged in the superseding indictment, the findings and conclusions made by the magistrate judge are correct and are adopted. The implied factual finding and related conclusion that the administrative forfeitures are based upon the same offenses requires discussion.

To bar subsequent prosecution, of course, a forfeiture must be based on the same offense charged in the indictment. $405,089.23, 33 F.3d at 1216. The Supreme

Court recently explained that the only proper way to test for the "sameness" of two crimes is to compare the individual elements of each. If there is not at least one different element, then the crimes are the same offense for double jeopardy purposes. United States v. Dixon, _ U.S. _, 113 S.Ct. 2849, 2856 (1993). In overruling Grady v. Corbin, 495 U.S. 508 (1990), the Dixon Court held that, even if proof of one of the elements of the second crime will involve proof of the same conduct underpinning an element of the first crime, there is no double jeopardy problem so long as at least one element is not common to both.

The Government argues that application for the same element test to the completed administrative forfeitures and the crimes charged in the superseding indictment discloses that prosecution of Plunk as charged, will not expose him to double jeopardy. With regard to the conspiracy counts in the superseding indictment, this court understands the Government's argument to be as follows. According to the Snider declaration, the administrative forfeitures were all based upon alleged violations of 21 U.S.C. § 841(a)(1) which criminalizes the possession of cocaine with intent to distribute. Violation of 21 U.S.C. § 841(a)(1) is a crime whose elements do not include the element of agreement, which is required for any conspiracy so the crimes charged in counts 1 and 12 differ from the conduct upon which the forfeitures were based according to Snider's explanation.

At most, the Government would acknowledge some merit to the proposition that the administrative forfeitures did implicate the Alaska I and Alaska II conspiracies.[6] This concession would be consistent with the fact that the Snider

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[6] The government makes little of the differences between these two conspiracies, which the government calls simply the "historical" conspiracy. The government term for the Lower 48 conspiracy is the "Columbian" [sic] conspiracy.

declaration also indicates that the forfeitures proceeded based upon Plunk's arrest. Plunk was arrested because he was charged in the original indictment with participation in the Alaska I conspiracy.

So long as the administrative forfeitures are not seen to involve more than distribution of cocaine in Alaska and the Alaska I conspiracy, the Government is correct, because a comparison of the Alaska I conspiracy described in the original indictment and the "Lower 48" conspiracy charged in count 1 and the Alaska II conspiracy charged in count 12 shows that the elements to be proved are different. To prove the Alaska I conspiracy, the Government would have to prove agreement to distribute cocaine in Alaska from the Fall of 1987 until no later than April of 1991. In contrast, to prove guilt on Count 1, the Government would have to prove that Plunk agreed with someone else to distribute cocaine across the "Lower 48" from about April of 1993 until December of 1993. To prove the Alaska II conspiracy charged in count 12, the Government would have to prove that Plunk agreed with someone to distribute cocaine in Alaska from the Fall of 1980 until December of 1993. The three conspiracies charged depend on proof of demonstrably different agreements and are, therefore, different crimes.

Count 2 charging continuing criminal enterprise involves several elements not included in either the violation of 21 U.S.C. § 841(a)(1), cited directly by Snider, or the Alaska I conspiracy indirectly involved by Snider, as the bases for the administrative forfeitures. See 21 U.S.C. § 848. Counts 3 through 6 charge that Plunk used communication devices to facilitate drug trafficking. Again it is apparent that the elements of the crime are different from either possession with intent to distribute or conspiracy to distribute cocaine. See 21 U.S.C. § 843(b).

Counts 9,10, and 11 charge Plunk with possession with intent to distribute cocaine, the very crime upon which Snider says the administrative forfeitures proceeded, but the distribution charged involves transactions associated with the Lower 48 conspiracy, not the Alaska I conspiracy charged in the original indictment extant at the time of the seizures. Thus, it would appear that these three counts need not be dismissed if one accepts the Government's analysis of the forfeiture proceedings.

The difficulty with the Government's analysis is that it depends upon accepting at somewhat less than full face value an explanation of the bases for the four administrative forfeiture proceedings offered by DEA counsel Snider which is not entirely consistent with all of the available information, including information referenced by Mr. Snider. According to the Snider declaration, the decision to accept each of the four cases for administrative forfeiture was made at the end of an evaluation process which "included a legal review of the probable cause that existed to seize [the item seized]." Snider declaration at ¶¶ 4(a), 5(a), 6(a), and 7(a).

Evidence of what probable cause was used to support the three property seizures at Plunk's residence[7] is found in the March 22, 1994, affidavit of DEA special agent Cayford used to obtain the search warrant for the residence. Cayford's affidavit is <u>not</u> limited to asserting probable cause to believe Plunk is guilty only of simple possession with intent to distribute or participation in the Alaska I conspiracy. The Cayford affidavit recites probable cause to believe facts that would support Plunk's participation in the

[7] These were the seizures of the $9,660 in U.S. currency, the firearms, and the placer gold.

Alaska I conspiracy, the Alaska II conspiracy, and the Lower 48 conspiracy.

The information Cayford attributes to Warren Jeff Funderburk at ¶ 1 of the Background section of his affidavit indicates that on 10 to 15 occasions between Fall of 1988 and Spring of 1990, Plunk sold kilogram quantities of cocaine to Funderburk, who then resold the drug. This information appears relevant to either the Alaska I or Alaska II conspiracies, as well as to possession with intent to distribute in Alaska. At ¶ 2 of the affidavit, Cayford attributed information to an anonymous source who described himself as a facilitator in the Plunk transfers to Funderburk.[8] The information Cayford attributes to Hal Booher at ¶¶ 3 and 4 concerning repeated interstate deliveries of 200 to 220 kilogram loads of cocaine is information associated with the Lower 48 conspiracy, as well as with possession with intent to distribute somewhere outside Alaska. The assertions in ¶ 4(D) that Booher met Plunk in November 1983 and that Booher learned Plunk distributed cocaine in Alaska appear to establish a pattern of distribution more likely consistent with the Alaska II conspiracy than the Alaska I conspiracy.[9] The information

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[8] The size of Plunk's sales to Funderburk, the participation of a third party as a "facilitator," and the resale by Funderburk all imply that Plunk had some sort of agreement regarding the distribution and, hence, was participating in a conspiracy.

[9] It may first be observed that in isolation this paragraph is equally consistent with simple possession and distribution. The absence of quantity information, such as the kilogram sales to Funderburk, and the absence of any information that the sales involved a "facilitator" makes this information consistent with simple distribution not involving an agreement with others. However, in the overall context of the affidavit, it seems as likely to evidence the outcome of joint effort as sales by Plunk acting alone. As to the question of whether the information relates to the Alaska I or Alaska II conspiracies, the way the paragraph is written leaves unclear when Booher learned of Plunk's participation in cocaine

in ¶ 5 clearly relates to distribution in Alaska and, combined with the other information, may also relate to either the Alaska I or Alaska II conspiracies.

The fourth seizure made at the time of Plunk's arrest necessarily proceeded on the basis that Plunk was properly arrested. Thus, seizure of the Rolex appears to have been based upon probable cause to believe that Plunk had committed the crime charged in the original indictment--participation in the Alaska I conspiracy.

This court finds that the crimes the Government had reason to believe Plunk had committed at the time of the seizures and upon which the administrative forfeitures proceeded were that Plunk possessed cocaine with intent to distribute it in Alaska, that Plunk possessed cocaine with intent to distribute it somewhere outside Alaska, and that Plunk was a member of the Alaska I, Alaska II and Lower 48 conspiracies. When this finding is coupled with the other findings and conclusions reached by the magistrate judge and adopted by this court, it follows that counts 1, 9, 10, 11 and 12 must be dismissed, because Plunk cannot be put in jeopardy on charges for which he has already been punished. The remaining counts being constituted neither of the same criminal acts upon which the administrative forfeitures proceeded, nor criminal acts comprised of the same elements under the Dixon test, should not be dismissed. Prosecution of Plunk on counts 2 (continuing criminal enterprise), and counts 3 through 6 (communications facility used in drug trafficking) may proceed without violating the Double Jeopardy Clause.

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distribution in Alaska. It is clear Booher met Plunk in November of 1983. Thus, it is a more natural reading of the paragraph to conclude that Plunk was involved in distributing cocaine in Alaska prior to the inception of the Alaska I conspiracy in Fall of 1987.

Plunk invites this court to hold that count 2 through 6 must be dismissed. He makes several points. First, each Notice of Seizure recites that the subject property "was seized by Special Agents of the [DEA] for forfeiture under [21 U.S.C. § 881] because it was used or acquired as a result of a **drug-related offense**. (See [21 C.F.F. § 1316.91(d)] for the definition of the term 'drug-related offense.')" (Boldface in original.) The regulation cited in the notices to define the crime supporting the forfeitures provides:

> The term Drug-Related Offense means any proscribed offense which involves the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited by Title 21 U.S.C.

21 C.F.R. § 1316.91(d).

Plunk also points out that only two of the administrative forfeitures were the subject of notice of forfeiture letters sent prior to the return of the superseding indictment on April 26, 1994. The letter concerning the Rolex was sent to Plunk and to the publisher on April 18, 1994. The letter concerning the firearms was sent on April 25, 1994. The other two letters concerning the $9,660 and the placer gold were not sent until May 9, 1994. However, there is nothing in the letters which purports to retroactively alter the basis for the seizures, all four of which antedate the superseding indictment.

Plunk also notes that in each of the four proceedings, the Declaration of Forfeiture fails to recite the specific crime upon which the forfeiture was predicated. Each merely indicates that the property was seized pursuant to 21 U.S.C. § 881, that notice was given pursuant to 19 U.S.C. § 1607,

and that the property is declared forfeit pursuant to 19 U.S.C. § 1609.

Plunk is correct to the extent that the statutory and regulatory underpinnings of the seizures are consistent with forfeitures based upon all of the crimes charged in the superseding indictment; these authorities are written broadly to embrace any violation of 21 U.S.C. § 801 et seq. However, Plunk is incorrect to the extent that he maintains the facts show the administrative forfeitures were based upon the continuing criminal enterprise and use of communication facility crimes. The probable cause supporting the seizures did not include information supporting the continuing criminal enterprise and communication facility crimes.

Plunk advances additional arguments, including arguments based on the concepts of waiver and estoppel. This court has considered all of Plunk's other arguments and finds them to be without merit.

CONCLUSION

For the reasons set forth above and for the reasons provided in the report and recommendation at docket 208, the motion at docket 185 is **GRANTED IN PART** and **DENIED IN PART** as follows: Counts 1, 9, 10, 11, and 12 are dismissed. Counts 2 through 6 inclusive remain set for trial on January 3, 1995.

Any party not satisfied with this court's decision shall immediately take an expedited appeal as contemplated by United State [sic] v. Abney, 431 U.S. 652, 662 n.8 (1977). The Clerk is directed to expedite preparation of whatever record on appeal the parties may designate. The parties are

authorized to designate documents filed in Case No. A94-401 Civ (JDS) for inclusion in the record on appeal in this action. The Clerk shall call counsel immediately upon filing of this order and counsel shall promptly obtain copies.

DATED this 17th day of November, 1994 at Anchorage, Alaska.

/S/

JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

FILED
NOV 4 1994

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By:_____/S/_____ Deputy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	) Case No. A94-036 CR
	) (JWS)
Plaintiff,	)
	)
v.	) RECOMMENDATION
	) REGARDING MOTION TO
GERALD FRANK	) DISMISS ON GROUNDS
	) OF DOUBLE JEOPARDY
Defendant.	)
_____	) (Document No. 185)

Defendant **GERALD FRANK PLUNK** moves for an order barring his prosecution in the instant case on grounds of double jeopardy. Plunk contends that his further prosecution violates the Fifth Amendment's Double Jeopardy Clause because he has already been placed in jeopardy in administrative and civil forfeiture proceedings. Docket No. 185. The government opposes the motion at Docket No.

189.[1] For reasons stated below, I recommend that the Motion to Dismiss be GRANTED.

BACKGROUND

Gerald Plunk was indicted on March 23, 1994, for conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. Mr. Plunk was arrested March 25, 1994, and detained in custody pursuant to a pretrial detention order. At the detention hearing the government presented evidence and argued that certain items (hand guns, currency in a heat-sealed package, placer gold, passport) hidden in Plunk's residence were incriminating. Agents of the Drug Enforcement Administration (DEA) executed search warrants as follows: A94-049 MJ issued March 22, 1994 for A-Frame single residence, 14940 Long Bow Drive, Anchorage; A94-051 MJ issued April 5, 1994 for Big Mountain Lodge, Iguigig, Alaska; A94-056 MJ issued April 5, 1994 for Safe Deposit Box #190 FNBA-Main Branch, Anchorage; A94-095 MJ issued April 26, 1994 for Fly-in Cabin, Hock Lake; and A94-096 MJ issued April 26, 1994 for Floor Safe, 2101 W. 29th Ave # 27, Anchorage. Subsequently, the government seized four (4) airplanes at the

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[1] The following additional pleadings were filed:

Docket No. 193, Defendant's Supplemental Exhibits in Support of Motion for Order Barring Further Prosecution on Grounds of Double Jeopardy; *Docket No. 196*, Government's Response to Defendant's Motion for Continuance Pending Interlocutory Appeal on Grounds of Double Jeopardy; *Docket No. 197*, Government's Supplementary Response to Defendant's Motion to Dismiss; *Docket No. 198*, Supplemental Briefing Regarding Divestiture of Jurisdiction Pending Appeal on Double Jeopardy Issue; *Docket No. 202*, Defendant's Reply to Government's Opposition and Government's Supplemental Opposition to Motion to Dismiss on Grounds of Double Jeopardy; *Docket No. 203*, Defendant's Request for Evidentiary Hearing. Defendant's Supplemental Reply to Government's Opposition and Government's Supplemental Opposition to Motion for Order Barring Further Prosecution of Grounds of Double Jeopardy was filed in Open Court on November 3, 1994.

lodge and certain real property. Publication of Notice of Seizures were made in late May and early June, 1994.

The government issued Notices of Seizure for property seized March 24, 1994 from Gerald Plunk as follows:

> *Nine (9) assorted weapons valued at $4,040;*
>
> *$9,660 in currency; and*
>
> *Placer gold valued at $967.89.*

First publication of this property occurred in May 1994. See Exhibits A, B and C to Defendant's Motion for Order Barring Further Prosecution, Docket No. 185. A separate Notice of Seizure was published April 27, 1994, for a

> *Rolex wristwatch valued at $1,500*, seized from Gerald Plunk on or about March 25, 1994.

See Exhibit D, Docket No. 185.

A Declaration of Forfeiture was issued by the Senior Attorney, Office of Chief Counsel, Asset Forfeiture Section of the Department of Justice for the Rolex wristwatch on June 3, 1994 and for the $9,660 in currency on June 24, 1994. See Exhibit B to Government's Supplementary Response, Docket No. 197. The nine (9) firearms and the placer gold were also forfeited administratively on June 10, 1994 and August 19,1994, respectively. See Exhibits E and F attached to Plunk's Notice of Additional Exhibits, Docket No. 205. These declarations indicate that no claims were filed for said property.

A superseding indictment filed April 26, 1994, added a co-defendant Timothy Pierson. It alleges charges against Plunk of continuing a criminal enterprise (21 U.S.C. § 848), illegal use of a communication facility (21 U.S.C. § 843(b)), possession of cocaine with intent to distribute (21 U.S.C. § 841(a)(1) and a second conspiracy to distribute cocaine (21 U.S.C. § 846). Count two of the superseding indictment seeks to forfeit a (different) bag of currency and various described pieces of real estate allegedly constituting or derived from drug trafficking proceeds during the continuing criminal enterprise pursuant to 21 U.S.C. § 853 and 848.

On September 8, 1994, the United States filed a verified complaint to enforce the provisions of 21 U.S.C. § 881(a)(6) for forfeiture of four (4) aircraft traceable to an exchange for controlled substances in violation of 21 U.S.C. § 801 et seq. See United States v. Four Aircraft, etc., Case No. A94-401 Civil (D.Alaska). The complaint alleged Gerald Plunk as the registered owner of the aircraft. The in rem complaint relied upon the same investigation as led to Plunk's indictment. Plunk filed a Notice of Claim on September 23, 1994. On October 27, 1994, the government moved for a stay of proceedings pending the outcome of Plunk's criminal prosecution.

DISCUSSION

Plunk contends that jeopardy attached when the government adjudicated administrative forfeitures of property seized by the government as a result of the underlying alleged criminal conduct. He contends that he was forced to suffer the forfeiture of his personal property in order to maintain his constitutional right to remain silent and avoid self-incrimination. He objects to further proceedings of the criminal trial including empaneling of the jury. Plunk argues that he has already been punished as a result of

seizures and administrative forfeiture of his personal property. He seeks an order dismissing the indictment as to him with prejudice.

The government responds that the seizure of the property does not constitute "punishment" or consecutive proceedings as defined by case law. Government's Response, Docket No. 189, p.2. The government argues that administrative forfeitures are distinct from civil forfeitures with respect to the Double Jeopardy Clause of the Fifth Amendment. It claims that Plunk has not been "punished" by the administrative forfeiture of property to which he made no claim. The issue posed is whether the Double Jeopardy Clause of the United States Constitution is implicated. This determination is grounded in the facts of the particular case, as well as the nature of the law under which the sanctions were imposed.

In drafting the initial version of what came to be the Double Jeopardy Clause, James Madison focused explicitly on the issue of multiple punishment. He stated "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense." United States v. Halper, 490 U.S. 435, 440 citing 1 Annals of Cong. 434 (1789-91) (Gales Ed. 1934).[2] The Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction;

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[2] Halper involved a medical doctor who had been convicted and punished under the Criminal False Claim statute, 18 U.S.C. § 287 for filing false MediCare claims. The court considered whether he could be fined for the same false claims under the civil provisions of the False Claims Act, 31 U.S.C. §§ 3729-3731. The court held that the Double Jeopardy Clause prevented it, to the extent that the fine exceeded what was needed to cover "legitimate non-punitive governmental objectives." 490 U.S. at 448.

and multiple punishments for the same offense. In Re Kurth Ranch, 986 F.2d 1308, 1310 (9th Cir. 1993), affirmed 114 S.Ct. 1937 (1994); United States v. Halper, 490 U.S. 435, 440 (1989). Plunk's motion implicates the third of these protections.

The multiple-punishment prohibition applies when the government attempts to criminally punish a defendant twice for the same offense. United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). The clause does not bar the government from imposing both a civil and a criminal penalty upon a defendant for the same offense. Helvering v. Mitchell, 303 U.S. 391 (1938). However, where the government seeks to impose not only a criminal sanction, but also a civil sanction in a separate proceeding that can be understood as punitive, the Double Jeopardy Clause is violated. See United States v. Halper, 490 435, 448 (1989); United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994).[3]

To determine whether criminal prosecution violates the Fifth Amendment in light of the forfeiture proceedings, the court must consider two questions: Whether the criminal prosecution and the civil forfeiture actions constitute separate "proceedings," and whether civil forfeiture under 21 U.S.C. § 881(a)(6) constitutes "punishment." United States v. $405,089.23 U.S. Currency, 32 F.3d 1210, 1216 (9th Cir. 1984).

A. Separate Proceedings

The government's efforts in characterizing the proceedings as one coordinated prosecution fails under

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[3] A Motion for Rehearing En Banc filed on or about October 20, 1994 is pending.

contemporary Ninth Circuit law. The government's characterization of a forfeiture as "administrative" does not preclude this conclusion. In the Ninth Circuit, parallel proceedings are separate proceedings, not the "same proceedings." $405,089.23 U.S. Currency, at 1216. In that case the Ninth Circuit relying on Jeffers v. United States, 432 U.S. 137 (1977) rejected the contrary view of the Second and Eleventh Circuits. "[A] civil forfeiture action which is brought and tried separately from a criminal prosecution and is based upon the same offense constitutes a separate 'proceeding'." $405,089.23 U.S. Currency, at 1218. In the instant case the forfeiture actions were before different fact-finders and different judges. Recently, a sister court concluded that the government's characterization of a forfeiture as "administrative" does not preclude this conclusion. Quinones-Riuz v. United States, 1994 WL 531313 (S.D.CA.)

B. Administrative Forfeitures As Punishment

Next, the court must determine whether any of the administrative forfeitures actions constitute "punishment." Administrative forfeitures have been declared as to the Rolex Watch, $9,660 in currency, gold nuggets and nine (9) firearms. No claims were filed in response to the Notice of Seizures for these properties. The government argues that the civil penalties imposed in these related administrative forfeiture actions, do not constitution [sic] "punishment" for the purpose of the Double Jeopardy Clause because judgment in the forfeiture proceedings was obtained by default and thus there is no showing that Plunk has been deprived of any of his property.

The government cannot seriously argue that the administrative forfeitures in this case do not refer to property associated with the criminal defendant. The search warrants

authorized searches of Plunk's property; the seizure notices reference Plunk, and the underlying investigation; and the indictment ties the property to Plunk. The record shows that Plunk was arrested for conduct giving rise to the administrative seizures and forfeitures as well as the indictment. The government's evidence at the bail hearing linked some of the personal property forfeited to Plunk. The government wants the court to find that Plunk has not been "punished" through civil forfeitures because he was not a party to those proceedings. At the same time the government would deny him standing to assert a claim unless he waived his Fifth Amendment rights to assert standing. The government cannot have it both ways.

Plunk relies on the government's use of seized evidence at the bail hearing to illustrate that some of the property referenced in the administrative forfeiture actions is the same property and relates to the same offenses for which he is being prosecuted. At the bail hearing the government argued that Plunk was using the firearms and money to facilitate the underlying conspiracy to traffic in controlled substances. Plunk refers to the bail hearing to show the interplay of his right against self-incrimination in the civil forfeiture proceedings and in the criminal prosecution.

The government analogizes this situation to one where a defendant "successfully avoids adjudication of his guilt." "Jeopardy" does not focus upon the resulting adjudication, but rather upon the defendant's position of having to defend. The mere filing of an indictment does not create jeopardy; the government may dismiss the charge without prejudice to re-instituting further prosecution for the same charge.

The Supreme Court has recognized a common understanding that civil proceedings may advance punitive

as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. 490 U.S. at 447. Under Halper it is the purpose actually served by the sanction imposed on the individual not the underlying nature of the proceeding giving rise to the sanction that must be evaluated in determining whether a particular civil sanction constitutes criminal punishment. Id, n.7. The labels "criminal" and "civil" are not significant in determining whether a sanction constitutes punishment for double jeopardy purposes. $405.089.23 U.S. Currency, at 1218; Quinones-Ruiz v. United States, 1994 WL 531313 (S.D.CA.) (Forfeiture of convicted plaintiff's currency constituted a second punishment in violation of plaintiff's right under the Fifth Amendment to be free from double jeopardy). A legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character for double jeopardy purposes. Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994); Halper, supra. Under Halper, a sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose. Austin v. United States, 113 S.Ct. 2801, 2806 (1993); $405,089.23 U.S. Currency, at 1219. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retribution or deterrent purposes, is punishment. . . ." Halper, 490 U.S. at 448.

The Supreme Court recognizes that statutory in rem forfeiture may impose punishment. Legislative history of 21 U.S.C. § 881 recognizes that "the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs." Senate Report No. 98-225, p. 191 (1983). The constitutional protection against double jeopardy is intrinsically personal. Halper.

The Ninth Circuit affirmed the district court's denial of a motion to dismiss the indictment on the grounds of double jeopardy holding that forfeiture of property used to grow marijuana was not a double jeopardy bar to the prosecution. See United States v. McCaslin, 959 F.2d 786 (9th Cir. 1992), cert. denied 113 S.Ct. 382 (1992). The Ninth Circuit held that Halper had no application to the ancient practice by which instrumentalities of a crime may be declared forfeit to the government. 959 F.2d at 788. Subsequently, the Ninth Circuit recognized in United States v. $405,089.23 U.S. Currency, that the Supreme Court in Austin rejected the McCaslin analysis. The Supreme Court stated:

> "In light of the historical understanding of forfeitures as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood these provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose."

Austin, 113 S.Ct. at 2812, citing Halper, 490 U.S. at 448. See $405,089.23 U.S. Currency, 33 F.3d at 1219. Most recently, Judge Dwyer granted McCaslin's motion to vacate conviction and sentence under 28 U.S.C. § 2255 for the reason that the criminal sentence, imposed in a separate proceeding more than a year after judgment was entered forfeiting his residential real property under 21 U.S.C. § 881(a)(7), constituted a second punishment for the same offense in violation of the Double Jeopardy Clause. See United States v. Duane B. McCaslin, 1994 WL 494764 (W.D.WA. 1993).

Even though the forfeiture proceedings in the instant case were commenced before the Ninth Circuit rendered its opinion in $405,089.23 U.S. Currency, the Halper -- Austin analysis, provided the test to determine whether a civil forfeiture under 21 U.S.C. § 881 constituted "punishment." In Austin the Supreme Court employed the Halper test which it used to decide whether a civil monetary penalty constituted "punishment" for purposes of the Double Jeopardy Clause in determining whether the excessive fines clause applied. The Ninth Circuit in $405,089.23 U.S. Currency merely restates what the Supreme Court's decision in Austin made clear that Halper's double jeopardy protections apply to most civil forfeiture cases. The government was not free to ignore Austin but rather should have looked to the entire applicable statute to determine whether a forfeiture constitutes "punishment" rather than dwelling on the nature of the property sought to be forfeited. Austin rejected a case-by-case approach to determine whether forfeiture constitutes "punishment." 113 S.Ct. at 2812, n.14.

The Austin court focused on 21 U.S.C. §§ 881(a)(4) and (a)(7). The court identified the punitive purpose of the sections on the culpability of the owner. Significant to the court was the fact that the statute expressly provided an innocent owner defense. It authorizes forfeiture only where the owner is himself involved in illegal activity. See Austin, 113 S.Ct. at 2810. The court noted that Congress has chosen to link forfeiture directly to the commission of drug offenses. Austin acknowledges the historical understanding of forfeiture as punishment. 113 S.Ct. at 2812.

Any doubt that the Austin analysis of what constitutes punishment applies as well under the Double Jeopardy Clause was made clear by the Supreme Court in Department of Revenue v. Kurth Ranch, 114 S.Ct. 1937 (1994). "A defendant convicted and punished for an offense

may not have a non-remedial civil penalty imposed against him for the same offense in a separate proceeding." Id. at 1945.

The principles set forth in Austin lead to the conclusion in the instant case that the statutes relied upon by the government operate to punish and deter notwithstanding any remedial purpose that may be served. The government forfeited the U.S. Currency, placer gold and watch under 21 U.S.C. § 881(a)(6). This section provides:

> "(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

The firearms were forfeited under 21 U.S.C. § 881(a)(11) which provides in pertinent part:

> "Any firearm (as defined in § 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property."

Authority for administrative forfeiture of the items pursuant to 21 U.S.C. § 881 is found at 19 U.S.C. § 1609. These forfeitures have the same force and effect as a contested civil judicial forfeiture. 19 U.S.C. § 1609(b). A contested trial is not necessary. See Kurth Ranch, 114 S.Ct. at 1492.

It is clear that jeopardy is complete when a judgment is entered. Id. at 1942. No judgment has been tendered in Case No. A94-401 Civil seeking the forfeiture of the four airplanes. Because the administrative forfeitures "resulted in punishment" it is unnecessary for the court to determine whether jeopardy has attached in Case No. A94-401 Civil, the civil forfeiture action against the airplanes.[4] It is likewise unnecessary to address Plunk's contention that the government purposely instituted the forfeiture proceedings to gain advantage by "splitting" the prosecution of Plunk into the civil punishment proceedings and criminal punishment proceedings.

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[4] Plunk contends that the mere filing of a forfeiture claim impacts his Fifth Amendment privileges and thereby constitutes jeopardy.

CONCLUSION

The administrative forfeitures of Plunk's Rolex watch, currency, placer gold and nine (9) firearms constitute "punishment" in a separate proceeding for double jeopardy purposes. Under Ninth Circuit law this court must conclude that the legislative history of the relevant statutes allowing the forfeitures show a Congressional intent to punish and deter, and they do not serve solely a remedial purpose.

The development of law in this area has arguably led to unintended results in the administration of justice. This court is bound to follow the Ninth Circuit law. It is up to the Supreme Court and Congress to provide clear direction in this quagmire. Accordingly, it is recommended that Defendant Plunk's Motion to Dismiss the Indictment on Grounds of Double Jeopardy be Granted.

DATED this 4th day of November, 1994, at Anchorage, Alaska.

/S/

JOHN D. ROBERTS
United States Magistrate Judge

Pursuant to Local Magistrate Rule 12(C), a party seeking to object to this proposed finding and recommendation shall file written objections with the Clerk of Court no later than the close of business on **NOVEMBER 9, 1994**. The failure to object to a magistrate judge's findings of fact may be treated as a procedural default and

waiver of the right to contest those findings on appeal. McCall v. Andrus, 628 F.2d 1185, 1187-1189 (9th Cir.), cert. denied, 450 U.S. 996 (1981). Objections and responses shall not exceed five (5) pages in length, and shall not merely reargue positions presented in motion papers. Rather, objections and responses shall specifically designate the findings or recommendations objected to, the basis of the objection, and the points and authorities in support. Response(s) to the objections shall be filed on or before **NOVEMBER 14, 1994**. The parties shall otherwise comply with provisions of Local Rule 12 (C).

Reports and recommendations are not appealable orders. Any notice of appeal pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the district court's judgment. See Hilliard v. Kincheloe, 796 F.2d 308 (9th Cir. 1986).

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(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036
	)	CR (JWS)
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF GERALD FRANK PLUNK IN SUPPORT OF MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA	)	
	)	ss.
THIRD JUDICIAL DISTRICT	)	

GERALD FRANK PLUNK, being first duly sworn under oath, deposes and states:

1. I voluntarily surrendered myself in the instant criminal matter on or about March 25, 1994 and was arrested.

2. At the time of my arrest I was wearing a Rolex watch which, upon information and belief, is the watch the subject of Seizure No. 152090, Case No. RG940002.

3. I was initially told by the marshals that I could remove my watch and give it to my attorney, Mr. Bryson.

4. The watch was then taken by a DEA agent.

5. After repeated inquiries by me and/or my attorney concerning said watch, I received notice of administrative forfeiture of the watch.

6. I further received notice of administrative seizures 152199, 152824, and 152183 with regard to certain currency, gold and guns allegedly seized from my residence, and upon the advice of my counsel, pursuant to my concerns and my attorney's concerns of the impact on my defense in the underlying criminal charges, I did not file formal claims at the administrative level given the advice of counsel and my concerns as they related to allegations made by the government in the superseding indictment and at the bail hearing and otherwise with regard to the significance of said items, namely, to the effect that admitting formal ownership and possession of said items might tend to incriminate me within the meaning of the Fifth Amendment of the United States Constitution, as to the criminal charges in this case.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

Gerald Frank Plunk

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

_____

Notary Public in and for the
State of Alaska
My Commission Expires: ___

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036
	)	CR (JWS)
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF GERALD FRANK PLUNK IN SUPPORT OF MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

GERALD FRANK PLUNK, being first duly sworn under oath, deposes and states:

1. I am the defendant in United States v. Plunk, Case No. A94-036 (JWS).

2. I am tendering this affidavit in support of my Motion to Bar Further Prosecution on the Grounds of Double Jeopardy.

3. By tendering this affidavit, I do not intend to make any limited or general waiver of my right to remain silent or against self-incrimination under the United States constitution or my rights to confidentiality of attorney/client communications.

4. It is my knowledge and belief that pursuant to the search warrant executed on my personal residence at 14940 Longbow Drive, Anchorage, Alaska, nine firearms were seized.

5. I obtained the following seized firearms from individuals who the government has informed me are cooperating witnesses in the case against me:

a. Ruger 22 mm: gift from David Nova.

b. Colt 45: purchased from Hal Booher.

6. I purchased the Wilding 475 pistol through my son-in-law, Michael Frizzell.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

_____

Gerald Frank Plunk

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

_____

Notary Public in and for the
State of Alaska
My Commission Expires: ___

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036
	)	CR (JWS)
	)	
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANT PLUNK'S MOTION FOR ORDER BARRING FURTHER PROSECUTION ON GROUNDS OF DOUBLE JEOPARDY

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

PHILLIP PAUL WEIDNER, being first duly sworn under oath, deposes and states:

1. I am the attorney of record for the defendant Gerald Frank Plunk in the instant matter.

2. This affidavit is submitted in support of the defendant's pending Motion for Order Barring Further Prosecution on Grounds of Double Jeopardy/Notice of Objection on Double Jeopardy Grounds to Further Proceedings and/or Jury Trial, and is not intended or made as any limited or general waiver of his rights to remain silent and against self-incrimination under the United States Constitution, or his rights to confidentiality of attorney/client privileges under same.

3. I was Mr. Plunk's attorney of record at the time of the return of the superseding indictment herein, and further, his attorney of record at the time of two detention hearings, and further, reviewed a transcript of the initial detention hearing held when Mr. Plunk was previously represented by William P. Bryson.

4. I was attorney of record for Mr. Plunk in the instant matter when he was served with and brought to my attention notice of seizures in Seizure Nos. 1521831, 152199, and 152824 relating to items allegedly seized from his alleged residence at 14940 Long Bow Drive, Anchorage, Alaska at the time of service of a search warrant herein.

5. Based upon my understanding of the government's allegations in the indictment and informal and/or formal discovery herein, including the fact that they were alleging that there was a critical "heat sealing" or "vacuum sealing" "food saving" machine which was allegedly discovered in a cocaine conspiracy case on the East Coast that had allegedly been used to package money and the fact that said machine was allegedly traced to a purchase by Mr. Plunk, and further my understanding that certain of the items the subject of the above-referenced seizures (i.e. the guns, gold, and currency, Seizure Nos. 152199, 152824, and 1521831) related to ownership and/or possession of currency allegedly seized at Mr. Plunk's residence (including Search

Warrant No. A94-0049 MJ, inventory nos. N-127, N-109, and N-112), and further based upon my understanding that the government was alleging that certain sales of drugs had been made out of that residence by Mr. Plunk to a cooperating witness, and further, based upon my understanding of the federal sentencing and substantive laws with regard to firearms and controlled substances, and further, based upon my understanding of the government's allegations and evidence and the court's findings at the bail/detention hearing, I advised Mr. Plunk that in order to protect his rights against self-incrimination and to not prejudice his defense with regard to the criminal charges in the underlying superseding indictment that he should not file a formal claim at the administrative level with regard to said seizures. This advice was further based upon my understanding of the government's position and/or case law with regard to attempts to preserve Fifth Amendment privileges while litigating administrative and civil forfeitures brought by the government as a result of alleged controlled substance activities.

FURTHER AFFIANT SAYETH NAUGHT.

/S/

Phillip Paul Weidner

SUBSCRIBED AND SWORN TO before me, the undersigned, a Notary Public in and for the State of Alaska, duly commissioned as such, this 2nd day of November, 1994.

/S/

Notary Public in and for the

State of Alaska
My Commission Expires: 7/25/97

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152824 Case #: RG940002
PROP: PLACER GOLD, 3 SMALL PLASTIC BAGS
ID#:
VALUE: $967.89
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD FRANK
SEIZED FROM: PLUNK, GERALD FRANK, INMATE
JUDICIAL DIST: ALASKA

DATE:
AUGUST 19, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA

USMS: ANCHORAGE, ALASKA

BY: AEB AD CODE #: 244

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152199 Case #: RG940002
PROP: $9,660.00 U.S. CURRENCY
ID#:
VALUE: $9660.00
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD FRANK, INMATE NO.:
SEIZED FROM: PLUNK, GERALD FRANK
JUDICIAL DIST: ALASKA

DATE:
JUNE 24, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA

USMS: ANCHORAGE, ALASKA

BY: AEB AD CODE #: 244

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152183 Case #: RG940002
PROP: 9 ASSORTED WEAPONS
ID#:
VALUE: $4040.00
SEIZURE DATE: 24 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD F.
SEIZED FROM: PLUNK, FRANK INMATE #760
JUDICIAL DIST: ALASKA

DATE:
JUNE 10, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA

USMS: ANCHORAGE, ALASKA

BY: AEB AD CODE #: 242

DEA.294 (MAR.92)

U.S. Department of Justice
Drug Enforcement Administration

Seizure #: 152090 Case #: RG940002
PROP: ROLEX WRIST WATCH, ROLEX OYSTER
ID#:
VALUE: $1500.00
SEIZURE DATE: 25 MAR 94
SEIZURE PLACE: ANCHORAGE, AK
OWNER: PLUNK, GERALD F.
SEIZED FROM: PLUNK, FRANK (INMATE #7603)
JUDICIAL DIST: ALASKA

DATE:
JUNE 3, 1994

DECLARATION FOR FORFEITURE

The above-described property has been seized by agents of the DRUG ENFORCEMENT ADMINISTRATION pursuant to 21 U.S.C. 881. Notice of a seizure has been sent to all known parties who may have a legal or possessory interest in the property. Also, in accordance with 19 U.S.C. 1607, notice of the seizure has been published and no claims have been filed for the property within 20 days from the date of first publication of the advertisement. THEREFORE, it is hereby declared that such property is forfeited to the United States pursuant to 19 U.S.C. 1609.

/S/
Senior Attorney
Office of Chief Counsel
Asset Forfeiture Section

cc: DEA/DO: SEATTLE, WASHINGTON
DEA/RO: ANCHORAGE, ALASKA

USMS: ANCHORAGE, ALASKA
BY: AEB AD CODE #: 241
DEA.294 (MAR.92)

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152199 Case #: RG940002
PROP: $9,660.00 U.S. CURRENCY

VALUE: $9660.00
SEIZURE DATE: 94 MAR 24 152199
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER: *
JUDICIAL DIST: ALASKA
BOND REQUIRED: $966 152199
DATE OF THIS LETTER: 09 MAY 94
DATE OF FIRST PUBLICATION: 94 MAY 18

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152199B

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a **drug-related offense**. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R. Sections 1316.71-1316.81,

procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in **court**. Also, under certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

TO REQUEST REMISSION OR MITIGATION OF THE FORFEITURE

If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. **Pursuant to Title 28, C.F.R., Section 9.4(c), a petition for remission or mitigation for forfeiture shall be signed and sworn to by the petitioner.**

TO CONTEST THE FORFEITURE

In addition to or in lieu of petitioning for remission or mitigation, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, you must file a claim of ownership and cost bond with the DEA. Submit the bond in the amount shown above in the form of a cashier's check or a certified check payable to the U.S. Department of Justice, or present satisfactory surety. **Claims must be signed by the parties making the claim**. Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. United States v. Fifteen Thousand Five Hundred Dollars, 558 F.2d 1359, 1360 (9th Cir. 1977).

If you are indigent (needy and poor) you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called a "Declaration in Support of Request to Proceed *In Forma Pauperis*" along with a claim of ownership of the property. Use the format of the *pauperis* declaration shown as Form 4 in the Appendix of Forms following Rule 48 of the Federal Rules of Appellate Procedure or obtain a form from a DEA field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within **twenty (20) days** of the **first date** of publication of the notice of seizure in the edition of the USA Today newspaper referenced above. The notice will be published three successive weeks.

U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152824 Case #: RG940002
PROP: PLACER GOLD, VALUE: $967.89

VALUE: $967.89
SEIZURE DATE: 94 MAR 24 152824B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $250
DATE OF THIS LETTER: 09 MAY 94 152824B
DATE OF FIRST PUBLICATION: 94 MAY 18

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152824B

NOTICE OF SEIZURE

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procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in **court**. Also, under certain circumstances, you may petition for the expedited release of the property. **You should review the following procedures very carefully.**

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U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152183 Case #: RG940002
PROP: 9 ASSORTED WEAPONS, VALUE: $4,040.00

VALUE: $4040.00
SEIZURE DATE: 94 MAR 24 152183B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $404
DATE OF THIS LETTER: 25 APR 94 152183B
DATE OF FIRST PUBLICATION: 94 MAY 04

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152183B

NOTICE OF SEIZURE

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U.S. DEPARTMENT OF JUSTICE
Drug Enforcement Administration

Seizure #: 152090 Case #: RG940002
PROP: 1 ROLEX WRIST WATCH, VALUE: $1,500.00
SERIAL'S #9378785, #168000
VALUE: $1500.00
SEIZURE DATE: 94 MAR 25 152090B
SEIZURE PLACE: ANCHORAGE, AK

SZD FROM: PLUNK, GERALD FRANK
OWNER:
JUDICIAL DIST: ALASKA
BOND REQUIRED: $250
DATE OF THIS LETTER: 18 APR 94 152090B
DATE OF FIRST PUBLICATION: 94 APR 27

PLUNK, GERALD FRANK
14940 LONGBOW DR
ANCHORAGE
AK 99516
152090B

NOTICE OF SEIZURE

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ROBERT C. BUNDY
UNITED STATES ATTORNEY

SUZANNE C. HAYDEN
Assistant U.S. Attorney
Federal Building & U.S. Courthouse
222 W. 7th Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271-5071

FILED
Apr 26 1994
U.S. DISTRICT COURT
DISTRICT OF ALASKA
By ___ Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	) Case No. A94-036 CR
Plaintiff,	) **COUNT 1** **CONSPIRACY TO DISTRIBUTE COCAINE**
vs.	
GERALD FRANK PLUNK, aka "FRANK", aka "EL FEO" AND TIMOTHY PIERSON, aka "TIM" aka "MR. T."	) Vio. Title 21 U.S.C. §841(a)(1) and 846
	) **COUNT 2** **CONTINUING CRIMINAL ENTERPRISE**
Defendants.	) Vio. Title 21 U.S.C. §848
	COUNT 3-8 **USE OF COMMUNICATION FACILITY** Vio. Title 21 U.S.C. § 843(b)

COUNT 9-11
POSSESSION WITH INTENT TO DISTRIBUTE
Vio. Title 21 U.S.C. § 841(a)(1)

COUNT 12
CONSPIRACY TO DISTRIBUTE COCAINE
Vio. Title 21 U.S.C. § 846 and 841(a)(1)

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT 1

Beginning on or about April 1, 1993, and continuing until on or about December 31, 1993, in the State and Federal of Alaska [sic] and elsewhere,

GERALD FRANK PLUNK
aka "FRANK"
aka EL FEO
AND
TIMOTHY PIERSON
aka "TIM"
aka "MR. T."

the defendants herein, and other persons whose names are known and unknown to the grand jury, did knowingly and intentionally combine, conspire, confederate and agree to

commit offenses against the United States, that is to distribute in excess of 2000 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A. **OBJECTIVES OF THE ORGANIZATION**

1. One objective of the organization was the possession of controlled substances (cocaine) with the intent to distribute the cocaine within the United States.

2. Another objective of the organization was the transportation of loads of cocaine from the Los Angeles, California and the Houston, Texas areas to New Jersey on behalf of the Colombian Cali Cartel.

3. The primary objective of the organization was the distribution of multi-kilogram loads of cocaine for financial gain.

B. **THE PARTICIPANTS IN THE ORGANIZATION**

The organization consisted of numerous individuals aligned in various sub-groups all working toward the common objective of distributing cocaine for financial gain.

1. JACO, aka EL COMPADRE, a Colombian National living in Colombia was the principal organizer, supervisor and manager of the organization. His job was the transportation of cocaine into the United States and the ultimate supervision of the distribution of the cocaine throughout the United States.

2. LEON ALBERTO MALCA, aka JAMES, aka RICKI (hereinafter JAMES) (charged elsewhere) was a principal supervisor in New York who coordinated the Colombian and North American distribution of multi-kilo loads of cocaine.

3. GERALD FRANK PLUNK, aka FRANK, aka FEO, (hereinafter PLUNK) was the principal organizer, supervisor and manager of the interstate transportation of

multi-kilo loads of cocaine. He was responsible for establishing a transportation network from the Southern borders of the United States to the New Jersey area.

4. JOHN TIMOTHY PIERSON, aka MR. T., (hereinafter PIERSON) was initially a driver for PLUNK but later became responsible for the transportation network when law enforcement began investigating PLUNK.

5. Tony, aka, Alphonse, supervised the storage of cocaine in Los Angles [sic], California.

6. CARLOS ANDRES SERRATO (charged elsewhere) and MIGUEL ANGEL VILLALKA (charged elsewhere) delivered vehicles loaded with cocaine to predesignated locations to be off-loaded by the drivers initiating their cross-country travel.

7. ELBA DUENAS, aka ERICA (charged elsewhere) delivered empty vehicles from New York to predesignated locations in New Jersey to enable cross-country drivers to off-load their cocaine shipments into the vehicles. She sometimes delivered cocaine proceeds to BARRY TENDLER.

8. BARRY TENDLER aka THE BEAR, (charged elsewhere) assisted PLUNK in the delivery of cocaine to drivers in Los Angeles and participated in the distribution of payments to the drivers and the receipt of drug proceeds.

9. HAL BOOHER aka PANCHO (charged elsewhere) was an interstate driver who utilized a trailer and a motorhome to transport approximately 1225 kilos of cocaine between Los Angeles, Houston, and New Jersey.

10. CISCO and D.D., unindicted co-conspirators, were interstate drivers hired by PLUNK to transport approximately 1775 kilos of cocaine from Los Angeles and Houston to New Jersey, utilizing motorhomes and trucks.

C. **METHODS AND MEANS**

1. It was a part of the conspiracy that the participants of the organization employed code names, and communicated by code through the use of Sky Talk and Sky Page and cellular phones to avoid detection by law enforcement as they communicated their cocaine transportation messages.

2. It was a part of the conspiracy to use recreational-type vehicles to transport kilo loads of cocaine across country.

3. It was a part of the conspiracy that PLUNK would provide the currency to purchase the vehicles used for transporting cocaine.

4. It was a further part of the conspiracy to disguise the true nature of cross-country trips by having the drivers pass out brochures and video tapes describing defendant PLUNK's "BIG MOUNTAIN LODGE" located near Illiamna, Alaska.

5. It was a part of the conspiracy that after being told where to begin the journey, the drivers would load boxes or duffel bags of cocaine into waiting vehicles and travel across the United States to New Jersey.

6. It was a part of the conspiracy that upon arrival in New Jersey, drivers were notified that certain empty vehicles were waiting to be filled with the cocaine.

7. It was a further part of the conspiracy that throughout the journey and upon its completion, the drivers communicated by telephone and pager with defendant PLUNK who informed James of their progress.

8. It was a part of the conspiracy that El Compadre in Colombia would speak directly to James about the transactions, and that James would repeat portions of their conversations to PLUNK and that James would repeat similar conversations of PLUNK's to El Compadre.

9. It was a part of the conspiracy that PLUNK would purchase commercial heat sealing machines through

BIG MOUNTAIN LODGE and distribute them to the Colombians for the purpose of packaging proceeds (cash) from the distribution of cocaine.

10. It was a further part of the conspiracy that PLUNK would often pay drivers with vacuum packed envelopes of cash.

11. It was further part of the conspiracy that defendant PIERSON was to assume the role of transportation supervisor of the cocaine distribution when James and PLUNK feared the police were investigating PLUNK.

12. Finally, it was a part of the conspiracy that drivers were instructed how to avoid detection on their cross-country trips and instructed that they would be provided a "family doctor" (signifying a lawyer) in the event they were arrested.

D. **OVERT ACTS**

In furtherance of the conspiracy and to achieve the objects thereof the following over [sic] acts were committed:

1. On or about the first week of April 1993, PLUNK travelled [sic] to South America to meet with members of the Cali Cartel to discuss transporting cocaine into Alaska as well as across the United States.

2. On or about April 15, 1993, PLUNK traveled to Seattle, Washington to hire a driver to transport cocaine.

3. On or about April 26, 1993, PLUNK purchased a motorhome in Eagle River, Alaska for the purpose of transporting cocaine.

4. On or about June 4, 1993, PLUNK and Tendler arrived in Los Angeles to assist in loading approximately 174 kilos of cocaine into a motorhome which was destined for New Jersey.

5. In or around early July, PLUNK directed Cisco, and Pancho to transport cocaine from Los Angeles to New Jersey.

6. On or about August 21, 1993, PLUNK directed an unindicted co-conspirator to transport approximately 200 kilos of cocaine from Houston, Texas to New Jersey.

7. On or about mid-September, PLUNK arranged for the transfer of ownership of a load vehicle used for transporting cocaine.

8. In or around early September, PLUNK directed Cisco to transport cocaine from Houston, Texas to New Jersey.

9. On or about October, 1993, PLUNK directed Pancho to transport approximately 200 kilos of cocaine from Houston, Texas to New Jersey.

10. In or around the middle of October, PLUNK directed Cisco to transport cocaine from Los Angeles to New Jersey.

11. In late October, PLUNK directed the transportation of approximately 100 kilos of cocaine from Los Angeles to New Jersey.

12. On or around Thanksgiving 1993, PLUNK directed Cisco, to transport a load of cocaine from Los Angeles to New Jersey in a Winnebago Motorhome.

13. On December 7, 1993, James telephoned PLUNK in Alaska to discuss Pancho's upcoming cocaine delivery as well as a delivery by defendant PIERSON.

14. On December 7, 1993, James telephoned Tony in California to discuss PLUNK and Pancho's upcoming arrival in Los Angeles.

15. On December 7, 1993 James telephoned Colombia to discuss "Panchito's" arrival.

16. On December 12, 1993, Pancho was arrested delivering 220 kilograms of cocaine to New Jersey.

17. On December 12, 1993, James telephoned Tony in Los Angeles and El Compadre in Colombia with news of Pancho's arrest.

18. On December 12, 1993, James telephoned PLUNK and discussed Pancho's arrest and discussed getting a lawyer for him.

19. On December 18, 1993, James telephoned Tendler to discuss Pancho's knowledge of the organization and getting a lawyer for him.

20. On December 18, 1993, James telephoned defendant PIERSON to discuss various locations for distributing cocaine, describing the organization to be like American Express . . . "everywhere".

All in violation of Title 21 U.S.C. § 841(a)(1) and 846.

COUNT 2

THE GRAND JURY FURTHER CHARGES THAT:

A. Beginning at a time unknown to the Grand Jury, but no later than April 1993, and continuing thereafter up to and including December 1993, in the State and Federal District of Alaska, and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly, intentionally, and unlawfully engage in a Continuing Criminal Enterprise in that he did violate Title 21, United States Code, Sections 846, 841(a)(1) and 843(b), which violations, among others, were part of a continuing series of violations, included but not limited to, the following:

1. Beginning on or about April 1, 1993, and continuing until on or about December 31, 1993, in the State and Federal of Alaska [sic] and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

Defendant herein, did willfully and knowingly combine, conspire and agree with others whose names are known or unknown to the Grand Jury to distribute in excess of two thousand kilograms of cocaine and to possess with intent to distribute cocaine, as alleged in Count One of this Indictment, which is incorporated in full herein;

2. On or about June 4, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 174 kilograms of cocaine, as alleged in Count 9 of this Indictment, which is incorporated in full herein;

3. On or about July, 1993, in the State and Federal District of Alaska, defendant PLUNK did knowingly and intentionally distribute approximately 350 kilograms of cocaine.

4. On or about August 21, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 200 kilograms of cocaine as alleged in Count 10 of this Indictment which is incorporated in full herein;

5. On or about December 12, 1993, defendant PLUNK did knowingly and intentionally distribute approximately 220 kilograms of cocaine as alleged in Count 11 of this Indictment which is incorporated in full herein;

6. On or about December 7, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 3 of this Indictment, which is incorporated in full herein;

7. On or about December 5, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 4 of this Indictment, which is incorporated in full herein;

8. On or about December 8, 1993, defendant PLUNK did knowingly and intentionally use the telephone to further his drug trafficking activities as alleged in Count 5 of this Indictment, which is incorporated in full herein;

9. On or about December 11, 1993, defendant PLUNK did knowingly and intentionally use the telephone

to further his drug trafficking activities, as alleged in Count 6 of this Indictment, which is incorporated in full herein;
Which series of violations were undertaken by defendant PLUNK in concert with at least five other persons with respect to whom defendant PLUNK occupied a position of organizer, a supervisory position, and other positions of management, and from which continuing series of violations defendant PLUNK obtained substantial income and resources.

B. **THE FORFEITURE PROVISIONS**

Through the above-mentioned continuing criminal enterprise, defendant

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

his nominees, assignees, agents and those in active concert and participation with him did directly and indirectly obtain substantial profits, proceeds and resources from said criminal enterprise, which shall be forfeited to the United States of America pursuant to the provisions of Title 21 U.S.C. § 853(a)(3) and which shall include all property constituting or derived from any proceeds obtained, directly or indirectly, as well as any properties used, or intended to be used, in any manner or part, to facilitate the commission of controlled substances violations as well as any interest in, claims against, and property or contractual rights affording said defendants a source of influence or control over the continuing criminal enterprise, including but not limited to the property described below:

1. ONE heat sealed bag of currency seized at 14940 Longbow Drive, Anchorage, Alaska on March 24, 1993 [sic], DEA Evidence number N-112.

2. Residence located at 14940 Longbow Drive, Anchorage, Alaska (Timberlux Subdivision #3, Block F, Lot 3).

3. Cabin with acreage more fully described as: T17NR5W, Section 33, Seward Prime Meridian, Alaska, Tract A, Plat 77-49, Alaska State Land Survey No. 76-182.

4. 4.99 acres of unimproved real property, T27NR4W, Section 22, Alaska Land Survey No. 77-91, Tract A (Chase Area) MATSU Borough, Alaska.

5. 12.32 acres of unimproved real property, more fully described as Inlet View Subdivision, MATSU Borough, Alaska,

a. Lot 2 Block 1
b. Lot 10 Block 1
c. Lot 11 Block 1
d. Lot 7 Block 5
e. Lot 8 Block 5
f. Lot 5 Block 6
g. Lot 6 Block 6
h. Lot 7 Block 6

6. .60 acres of unimproved real property located at Rabbit Creek Heights Block 4 Lot 6, Anchorage, Alaska.

7. Real property located at Tract B, Lot 3 #66, Sky Harbor Estates, Anchorage, Alaska.

8. Big Mountain Lodge, Igiugig, Alaska more particularly described as Lease Number 92-L-02, a portion of Lot 3, U.S. Survey 7982, Native Allotment AA-6277, located near Igiugig, Alaska, located in the Kvichak Recording District, State of Alaska, containing 14.057 acres.

If any of the properties described above as being subject to forfeiture pursuant to Title 21 United States Code, Section 853, as a result of any act or omission of the defendants —

a. cannot be located upon the exercise of due diligence;
b. has been transferred to, sold to, or deposited with a third party;

c. has been placed beyond the jurisdiction of this court;

d. has been substantially diminished in value; or

e. has been commingled with other properties that cannot be subdivided without difficulty;

it is the intent of the United States of America, pursuant to Title 21, United State [sic] Code, Section § 853(p), to seek forfeiture of any properties of the defendants up to the value of the properties listed above as subject to forfeiture.

All pursuant to Title 21, United States Code, Section 853 and 848.

COUNT 3

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 7, 1993, at approximately 7:49 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offense to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of title 21 U.S.C. 841(a)(1).

All in violation of Title 21 U.S.C. § 843(b).

COUNT 4

THE GRAND JURY CHARGES THAT:

On or about December 5, 1993, at approximately 11:59 AM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).
All in violation of Title 21 U.S.C. § 843(b).

COUNT 5

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 8, 1993, at approximately 3:43 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).
All in violation of Title 21 U.S.C. § 843(b).

COUNT 6

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 11, 1993, at approximately 4:03 PM, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. §846 and the distribution of cocaine, in violation of Title 21 U.S.C. §841(a)(1);
All in violation of Title 21 U.S.C. §843(b).

COUNT 7

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 15, 1993, at approximately 3:33 PM, in the State and Federal District of Alaska,

JOHN TIMOTHY PIERSON
AKA "TIM"
AKA "MR. T."

defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).
All in violation of Title 21 U.S.C. § 843(b).

COUNT 8

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 18, 1993, at approximately 1:03 PM, in the State and Federal District of Alaska,

JOHN TIMOTHY PIERSON
AKA "TIM"

AKA "MR. T."
defendant herein, did knowingly and intentionally use a communication device, that is, the telephone, to facilitate drug trafficking offenses, to wit: conspiracy to distribute cocaine a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 846 and distribution of cocaine, in violation of Title 21 U.S.C. 841(a)(1).
All in violation of Title 21 U.S.C. § 843(b).

COUNT 9

THE GRAND JURY FURTHER CHARGES THAT:

On or about June 4, 1993, in the State and Federal District of Alaska and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 174 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21, U.S.C. § 841(a)(1).

COUNT 10

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 21, 1993, in the State and Federal District of Alaska and elsewhere,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 200 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1).

COUNT 11

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 12, 1993, in the State and Federal District of Alaska,

GERALD FRANK PLUNK
AKA "FRANK"
AKA "EL FEO"

defendant herein, did knowingly and intentionally distribute approximately 220 kilograms of cocaine, a Schedule II Controlled Substance in violation of Title 21 U.S.C. § 841(a)(1).

COUNT 12

THE GRAND JURY FURTHER CHARGES THAT:

Between on or about the Fall of 1980, until December 31, 1993,

GERALD FRANK PLUNK

defendant herein, did willfully and knowingly combine, conspire, confederate and agree with others known and unknown to the grand jury to commit an offense against the United States, that is to distribute in excess of 10 kilograms of cocaine, a Schedule II Controlled Substance. One primary objective of the organization was the receipt of kilogram quantities of cocaine from Florida. The primary objective of the organization was to provide quantities of cocaine to local (Alaskan) drug traffickers for financial gain. All in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A true bill.

/S/
PRESIDING GRAND JUROR

/s/ Karen L. Loeffler
for ROBERT C. BUNDY
UNITED STATES ATTORNEY

/s/ Suzanne C. Hayden
SUZANNE C. HAYDEN
ASSISTANT UNITED STATES ATTORNEY
ORGANIZED CRIME DRUG ENFORCEMENT
TASK FORCE

4/26/94
DATE

ROBERT C. BUNDY
UNITED STATES ATTORNEY

SUZANNE C. HAYDEN
Assistant U.S. Attorney

Federal Building & U.S. Courthouse
222 W. 7th Avenue, Room 253, #9
Anchorage, Alaska 99513-7567
(907) 271-5071

FILED
Mar 23 1994
U.S. DISTRICT COURT
DISTRICT OF ALASKA
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	) Case No. A94-036 CR
Plaintiff,	)
	) **COUNT 1**
vs.	) **CONSPIRACY TO**
	) **DISTRIBUTE**
	) **COCAINE**
GERALD FRANK PLUNK,	) Vio. Title 21 U.S.C.
	) § 841(a)(1) and 846
Defendant.	)

INDICTMENT

THE GRANT JURY CHARGES THAT:

COUNT 1

Between on or about the Fall of 1987, until no later than April, 1991, the exact dates of which are unknown,

GERALD FRANK PLUNK

the defendant herein, did willfully and knowingly combine, conspire, confederate and agree with others known and unknown to the grand jury to commit an offense against the United States, that is to distribute in excess of 10 kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 U.S.C. § 841(a)(1) and 846.

A true bill.

/s/
PRESIDING GRAND JUROR

/s/ Robert C. Bundy
ROBERT C. BUNDY
UNITED STATES ATTORNEY

/s/ Suzanne C. Hayden
SUZANNE C. HAYDEN
ASSISTANT UNITED STATES ATTORNEY

3/22/94
DATE

AFFIDAVIT OF SPECIAL AGENT ROBERT E. CAYFORD

I, Robert E. Cayford, being duly sworn, hereby depose and say as follows:

INTRODUCTION

1. I am a Special Agent with the United States Drug Enforcement Administration (DEA) and have been so employed for the past eleven (11) years. I am vested with the authority to investigate violations of federal law, including Title 21, United States Code. In the course of my employment I have attended schools regarding the financial methods utilized by drug traffickers. In addition, during my eleven (11) years with DEA, I have assisted and served as the case agent on numerous drug investigations and have assisted or prepared search warrants regarding drug investigations. Upon my oath, I state that I believe the following facts to be true based on my training and experience in regard to narcotic investigations:

2. That drug trafficking is a continuous pattern of illegal substance distribution and not just a single event;

3. That drug traffickers very often place assets in the name of others to avoid detection by government agencies, and that drug manufacturers often utilize fictitious company names in an attempt to give a legitimate appearance to the purchase of items necessary for the production of controlled dangerous substances;

4. That even though these assets are in other person's names, the drug dealers continue to use these assets and exercise dominion and control over them;

5. That drug traffickers often maintain on hand large amounts of U.S. Currency in order to maintain and finance their ongoing narcotics business;

6. That individuals involved in drug trafficking profit from the sale of controlled substances and attempt to legitimize (launder) those profits. I know that to accomplish this task, these individuals often use false and fictitious records, passports, birth certificates, accounts in foreign and domestic banks, securities, cashier's checks, money drafts, letters of credit, brokerage houses, real estate, shell corporations, and business fronts. These individuals often transfer real and personal property to third persons or purchase same in other people's names;

7. That drug traffickers maintain books, computers, records, receipts, notes, ledgers, airline tickets, money orders and other papers relating to the transportation, ordering, sale and distribution of controlled substances;

8. That the aforementioned books, computers, records, receipts, notes, ledgers, etc., are maintained where the drug traffickers have ready access to them;

9. That it is common for drug traffickers to secret contraband, proceeds of drug sales, and records of drug transactions in secure locations, within their residence, vehicles, commercial storage units, safe deposit boxes, and businesses for ready access and to conceal them from law enforcement authorities;

10. That persons involved in drug trafficking often conceal in their residences caches of drugs, large amounts of currency, financial instruments, precious metals, jewelry and other items of value and/or proceeds of drug transactions relating to obtaining, transferring, secreting or spending of

large sums of money made from engaging in narcotics trafficking activities;

11. That drug traffickers commonly maintain addresses and telephone numbers in books or papers which reflect names, addresses and telephone numbers for their associates in the trafficking organization;

12. That drug traffickers take or cause to be taken photographs of them, their associates, their property, and their products;

13. That drug traffickers usually keep paraphernalia for packaging, cutting, weighing and distributing the drugs. That these paraphernalia include but, are not limited to, scales, plastic bags and cutting agents;

14. That drug traffickers frequently utilize alias names during every step of the drug trafficking operation, as well as using other individuals to carry out the means of drug trafficking;

15. I knew that in United States v. Hernandez-Escargega [sic], 886 F.2d 1560, 1567 (9th Cir. 1989) and United States v. Fannin, 817 F. 2d [sic] 1379, 1381-82 (9th Cir. 1987), the Court of Appeals held that in the case of drug traffickers, evidence is likely to be found where dealers live and a search warrant may be properly issued against a suspected drug dealer's residence despite the lack of direct evidence of criminal activity at the residence.

BACKGROUND

1. On July 9, 1992, Warren Jeff Funderburk was debriefed by DEA, Anchorage, pursuant to a plea agreement in which Funderburk and his wife, Kim, pled guilty to

cocaine trafficking. Warren Jeff Funderburk identified Frank Plunk as his source of supply for kilogram quantities of cocaine between the Fall 1988 and the Spring 1990. Funderburk claimed that he made 10 to 15 one kilogram purchases from Plunk during that period of time. Funderburk was a guest of Frank Plunk at his (Frank Plunk's)" [sic] Big Mountain Lodge" near Lake Iliamna, Alaska during that time.

2. On March 18, 1994, a Source of Information (SOI) was interviewed by DEA, Anchorage. This SOI admitted to being the facilitator of cocaine transactions between Frank Plunk and Warren Jeff Funderburk. The SOI would pick up money from Funderburk and deliver it to Frank Plunk at his (Plunk's) residence on Long Bow Drive, Anchorage, Alaska. Plunk would give the cocaine to the SOI at the time the money was delivered. The SOI would then deliver the cocaine to Funderburk at his residence.

3. On December 12, 1993, Hal Booher was arrested by DEA following the seizure of approximately 220 kilograms of cocaine from Booher's motorhome which Booher was driving in New Jersey. Booher was charged with Conspiracy and Possession with Intent to Distribute Cocaine in the Federal District of New Jersey.

4. Hal Booher agreed to cooperate with DEA following his arrest. Booher provided the following background information relating to his cocaine transporting activities:

A) About April 1993, Hal Booher was recruited by Gerald Frank Plunk to transport cocaine from Los Angeles, California or Houston, Texas to New Jersey. Plunk told Booher that he (Booher) would earn $20,000 to $30,000 per

load. Plunk indicated that he already had other driver(s) transporting cocaine for him.

B) About August 1993, Gerald Frank Plunk sent Booher $17,000.00 U.S. Currency via Federal Express or United Parcel Service (UPS). The money was to be used by Booher to purchase a recreational vehicle for transporting cocaine. The money was a verbal loan from Plunk to Booher.

C) Between August 1993 and December 1993, Booher admitted that he transported seven or eight loads for Plunk. Each load was about the same size, 200-220 kilograms.

D) Hal Booher became acquainted with Gerald Frank Plunk in Alaska in about November 1983. Booher became aware that Plunk distributed cocaine in the Anchorage, Alaska area. Booher stated that Plunk has a desk top computer at his (Plunk) home on Long Bow Drive, Anchorage, Alaska and that Plunk often coordinated cocaine transportation from his home telephone.

5. On March 11, 1993, a Source of Information (SOI) was interviewed by DEA, Anchorage, about SOI's knowledge of Gerald Frank Plunk. SOI stated that Plunk supplied him/her with cocaine on an average of three times per week during 1989 and 1990. SOI obtained the cocaine on numerous occasions from Plunk at Plunk's home located at 14940 Long Bow Drive, Anchorage, Alaska.

6. Based on the preceding information and the eleven (11) years of experience I have in the field of drug investigations, I believe Gerald Frank Plunk to be conducting a commercial cocaine distribution enterprise from his residence located at 14940 Long Bow Drive, Anchorage, Alaska. I also believe that he has stored cocaine

at his residence for approximately nine years and that there is evidence at the residence which will include cocaine, weighing, and packaging materials, currency and other assets and proceeds derived from the illicit trafficking of cocaine, business records showing purchase and sales and financial records showing proceeds and disposition of proceeds which are ill-gotten gains of the sale of cocaine. I believe there is evidence at the residence relating to transporting large shipments of cocaine across the United States.

Further your affiant sayeth naught.

/S/

Robert E. Cayford, Special Agent, Drug Enforcement Administration

Subscribed and Sworn to Before me this 22nd day of March 1994 at Anchorage, Alaska.

/S/

U.S. Magistrate Judge

Phillip Paul Weidner
Phillip Paul Weidner & Associates, Inc.
330 "L" Street, Suite 200
Anchorage, Alaska 99501
(907) 276-1200

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Case No. A94-0036
	)	CR (JWS)
vs.	)	
	)	
GERALD FRANK PLUNK, et al.,	)	
	)	
Defendants.	)	
	)	

MOTION IN LIMINE TO PROHIBIT NON-EXPERTS FROM OFFERING OPINION TESTIMONY

COMES NOW defendant, GERALD FRANK PLUNK, by and through counsel, PHILLIP PAUL WEIDNER of Phillip Paul Weidner & Associates, Inc., P.C., and hereby moves this Court, pursuant to Fed. R. Evid. 702 and 403, to exclude any and all testimony by government

"experts" purporting to explain codes and code names, and "the meaning of entries in drug ledgers and computer disks," as applied to the facts and allegations in the instant case.

ARGUMENT

I. TESTIMONY BY THE GOVERNMENT'S "EXPERTS" CONCERNING THE MEANING OF "CODES," "CODE NAMES," AND "ENTRIES IN DRUG LEDGERS AND COMPUTER DISKS" MUST BE EXCLUDED.

In determining whether expert testimony is admissible, the court must consider whether the witness is qualified as an expert, whether the proposed testimony is expert opinion based upon reliable method grounded in the methods and procedures of science, whether the proposed testimony will be "helpful" to the jury in understanding a material fact, and whether the information is more probative than prejudicial. See, e.g.,. Fed. R. Evid. 702 & 403; United States v. Gutierrez, 995 F.2d 169 (9th Cir. 1993); United States v. Rincon, 984 F.2d 1003 (9th Cir.), vac., 114 S. Ct. 41 (1993) (vacated for reconsideration in light of Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2795 (1993), the "junk science" case, which held that expert's

inference or assertion must be derived by "scientific method" rather than mere subjective belief or unsupported speculation).

a. There must be a Scientific Basis for the Expert's Testimony.

In addition to laying a foundation for their "experts'" qualifications as experts, the government must show that the opinion testimony the experts propose to offer is based on "more than subjective belief or unsupported speculation." Daubert, 113 S. Ct. at 2795. To be relevant, evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence." Id. at 2794; Fed. R. Evid. 401. The Supreme Court has held:

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

Daubert, 113 S. Ct. at 2795. Thus, before a government expert offers testimony as to his or her opinion, that opinion must be shown to be reliable under the standard of Daubert.

b. The Testimony Must Assist the Trier of Fact without Usurping the Jury's Role.

There is a vast difference between offering as evidence testimony that "drug dealers sometimes communicate through codes," and offering testimony as to the meaning of the purported code words as applied to the facts of the instant case. The former is arguably information that might be known to a person with substantial prior experience with drug dealers; while the latter improperly substitutes the subjective conclusions of the "expert" for the conclusions of the jury as to the ultimate issue of fact. Fed. R. Evid. 704. For example, in United States v. Bailey, 607 F.2d 237, 240 & nn. 7 & 8 (9th Cir. 1979), the Ninth Circuit upheld the district court's allowance of DEA agent testimony "regarding the meaning and use of code words and commonly used phrases in drug transactions," while disallowing testimony as to specific alleged code words used

by the defendants in that case (i.e., the agent could testify that "one" generally meant "one ounce," but not that "Phillips screwdriver" allegedly referred to heroin, as the facts of that case suggested). See also United States v. Patterson, 819 F.2d 1495 (9th Cir. 1987) (allowing expert testimony regarding how criminal narcotics distribution organizations generally operate); United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1984) (testimony as to general practices of criminals in complex fraud schemes allowed).

In the instant case, the prosecution has stated its intent to have its agents testify as to "the meaning of entries in drug ledgers and computer discs seized from one of the defendants." See Government's Memorandum at p.14 (Oct. 25, 1994). Clearly, the significance of the particular ledgers and discs as to the instant case (and to the ultimate issue of the case, as the testimony, if believed, would imply guilt) is not properly the subject of "expert" opinion. Similarly, any testimony by Government agents as to the meaning of the alleged "code words" in the instant case must likewise be excluded. Finally, testimony by

government agents that they recognized particular voices on tapes as belonging to one or more persons alleged to have participated in the alleged conspiracy must be subject to some sort of proof of their basis for recognition and ability to distinguish voices.

c. The Evidence is more Prejudicial than Probative.

Finally, expert testimony is subject to the requirements of Fed. R. Evid. 403, which states that evidence which is otherwise admissible must be excluded if its prejudicial nature outweighs its probative effect. See, e.g., Daubert, 113 S. Ct. at 2797-98. Careful consideration under Rule 403 is particularly necessary where the expert testimony offered is that of the officer involved in the investigation. Gutierrez, 995 F.2d 169, 172 (9th Cir. 1993).

RESPECTFULLY SUBMITTED THIS ___ day of July, 1996.

PHILLIP PAUL WEIDNER & ASSOC., INC.
Attorneys for Defendant
Gerald Frank Plunk

By: /S/
Phillip Paul Weidner

This is to certify that on this __ day
of July, 1996, a true and correct copy
of the foregoing was delivered by mail/
hand to:

Robert C. Bundy, U.S. Atty.
Suzanne C. Hayden, Assist. U.S. Atty.
U.S. Attorney's Office
222 W. 7th Ave., Rm. 253 #9
Anchorage, AK 99513

/S/

ORIGINAL
FILED
FEB 18 1997
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
by_____/s/___Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	) Case No. A94-0036
	) CR (JWS)
vs.	)
	) Anchorage, Alaska
GERALD FRANK PLUNK, et al.,	) Monday, November
	) 18, 1996
Defendants.	) 9:14 o'clock a.m.
	) **IMPOSITION OF SENTENCE**

PARTIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE

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1 downward departure which we need to address. The — I think it

2 probably is appropriate to reiterate here what I said earlier

3 in connection with the acceptance of responsibility matter,

which is still open until I hear Mr. Plunk's allocution, which could change the levels that I just mentioned. What I said earlier is important, though.

It's not appropriate for the Court to interject itself into plea negotiations. Assuming that the Court's overall concern for the integrity of the judicial process nevertheless makes room for some supervision. As I said earlier, I don't think that the government here thwarted the defendant's efforts to plead guilty. I've examined the papers submitted and find no evidence of any bad faith actions by the government.

Now, assuming that I have authority to make a downward departure here on the basis that Mr. Plunk's opportunity to accept responsibility was somehow thwarted, this is another

sort of tool I might use if I found that to be the case. Save only my opportunity to listen to Mr. Plunk's allocution, I find that I would not exercise that authority even assuming I have it. I would elect not to do so because there's inadequate evidence to support a finding of inappropriate behavior by the government. Mr. Plunk could have made a perfectly sensible, if nevertheless, severe deal with the government. They were offered to him and rejected by him.

We should now move to the argument that there is a

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disparity in sentencing which justifies a downward departure.

That's another of the departure arguments Mr. Weidner has very carefully laid out. I would like before I hear further argument from Mr. Weidner and Ms. Hayden to give you my preliminary

5 analysis and conclusions. -

6 I would begin with the legal framework. In United

7 States versus Taylor, reported at 991 F.2d 533, 535, a Ninth

8 Circuit decision from 1993, the Court of Appeals stated the

9 following with respect to guideline sentencing. And I quote:

10 "We have held that," quote, "'a disparity in sen—

11 tencing among co-defendants is not by itself a suffi-

12 cient ground for attacking an otherwise proper sen—

13 tence under the guidelines,'" close quote. "United

14 States v. Hoy, 932 F.2d 1343 at 1345, Ninth Circuit

15 1991. Rather, a defendant can only challenge his

16 sentence by showing that it-was the," quote, "'result

17 of incorrect or inadmissible information or an incor—

18 rect application of the sentencing guidelines,'" close

19 quote, citing "United States versus Carpenter, 914

20 F.2d 1131 at 1136, Ninth Circuit 1990."

21 "Perhaps the case most directly in point is United

22 States versus Melia," M-e-j-i-a,"953 F.2d 461, 468,
23 Ninth Circuit 1991. There, writing for the Ninth
24 Circuit, Judge Sneed (ph) stated, 'This Court has
25 specifically reserved the question of whether a dis—

1 trict court may depart downward for the purpose of
2 avoiding unequal treatment of co—defendants.'
3 "We now answer that question in the negative.
4 Basic notions of fairness dictate that defendants
5 should be sentenced in proportion to their crimes.
6 The sentencing guidelines attempt to ensure that all
7 defendants receive like sentences for like crimes. A
8 downward departure to correct sentencing disparity
9 brings a defendant's sentence more into line with his
10 or co—defendants' sentence but places it out of line
11 with sentences imposed on all similar offenders in
12 other cases."
13 I have omitted the citations to the material I just
14 quoted. Even if there were somehow some way to depart

based on

15 the alleged disparity of sentences, it should be noted that the

16 Person who played the role closest to that of Plunk was

17 Pierson, and he was sentenced to 324 months.

18 Plunk's comparison of himself to Barry Tendler may be

19 a fair one, but this Court did not sentence Tendler. And I

20 believe he was sentenced in state court where the guidelines do

21 not apply.

22 Plunk's comparison of himself to the woman Elba Duenas

23 is, frankly, ludicrous. She was such a pawn in this scheme

24 that she was expected to and did have sex with visiting higher-

25 ups in the cocaine trade.

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1 Serrato was a more major player who got a light

2 sentence, but he got it because he provided substantial aid to
3 the prosecution, something the available information indicates
4 Plunk flatly refused to do. See, for example, Plunk's state
5 ment dated July 27, 1994. Mr. Plunk aggrandized unto himself a
6 decision about whether these people were worthy of prosecu—
7 tions. He said, "My friends weren't," and he wasn't going to
8 help.
9 Mr. Weidner, I would like to hear anything you wish to
10 add to the arguments you've made with respect to this particu-
11 lar motion for a downward departure, sir, and then I'll hear
12 from the government.
13 MR. WEIDNER: Well, I object to Your Honor's charac-
14 terization of Erica. She —— the record reflects that she was

15 in this conspiracy be —— long before the name Frank Plunk was

16 every mentioned; that she actively drove cars --

17 THE COURT: She was a mule, I agree.

18 MR. WEIDNER: All right. And, Your Honor, I think --

19 and I do acknowledge that after we filed our memorandum in

20 light of the government's citation of that case you just

21 referred to, I shepherdized that case, and there's been some

22 more Ninth Circuit authority saying that you don't consider

23 disparity as a downward departure. But all that -- and I can

24 give Your Honor the authority if you want to hear it. I --

25 but --

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1 THE COURT: No, no, I mean, I think that's a seminal

case here ——

MR. WEIDNER: Right.

THE COURT: -- that tells me what I must do.

MR. WEIDNER: Except that case was before the Koon case. And I think that changes the whole landscape in terms of what's ——

THE COURT: All right.

MR. WEIDNER: -- permissible.

THE COURT: Tell me how you think Koon changes the whole landscape, because ——

MR. WEIDNER: All right.

THE COURT: — I have been unable to see that it does ——

MR. WEIDNER: All right.

THE COURT: —— change that.

MR. WEIDNER: This is why. To simplify, if I could, what they said in Koon, they say you look to see if something's prohibited, if it's favored, or if it's disfavored.

20 One of the starting points —— and the — and I cited

21 it at the start of my memorandum —— one of the starting point

22 for Sentencing Guidelines Act is at subsection (6) of —

18

23 U.S. Code 3553(a), subsection (6) says:

24 "The need to avoid unwarranted sentence disparities

25 among defendants with similar records who have been

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1 found guilty of similar conduct."

2 THE COURT: Don't overlook the rationale — I had a

3 reason for reading that quote from the decision, because what

4 the circuit court is telling me is that the disparity of

5 concern is system-wide. That's what led to the guidelines. I

6 mean, there's a lot to be debated about pluses and minuses

7 about the guidelines, but there was a lot of testimony, as you

probably know, about the fact that in Idaho, a guy who sold a few grams of some substance got 20 years, and if he did it in Southern California, they didn't even give him a ticket. So I can't be concerned just with this one case, I —— and I don't think the guidelines allow me to be. I mean, I think the rationale is that the guidelines should. be the same across the entire United States. So I don't think —— I mean, I think there's a false premise in your argument.

MR. WEIDNER: Well, I don't, Your Honor, and this is what I started to say is, if you read those cases carefully that came after the one you just say -- cited -- and I did. read them all over the weekend -- they talk about equalizing sen-tences. And they basically say that you can't depart downward

to equalize sentences. But I think when there's great dispar—
ity —— and when Mr. Serrato, Your Honor, gets 14 months, and
they're trying to give Frank Plunk life, that's incredible disparity.
THE COURT: I don't see the disparity, because after

all, Mr. Serrato cooperated and Mr. Plunk refused to.
MR. WEIDNER: Except, Your Honor, Mr. Serrato cooper-
ated and his wife got a walk, and they're still talking about Allison being responsible. There was testimony in this trial about Mr. Plunk's father being involved in this.
THE COURT: Those individuals are not on trial before this Court and I'm not going to speculate that they ever would
be.

MR. WEIDNER: No, but the point is, Your Honor, if he can't do a Rule 11 agreement like Mr. Serrato and basically incriminate everyone in, but could —— because his family members may be involved, then I think Your Honor's got —— you have authority under Koon to do some type of downward depar-ture. It doesn't have to be equalizing. But when the factor itself is not a disfavored factor and it hasn't been adequately taken in —— into consideration in this instance, you've got some authority to downward depart. That's what the Koon case said.

THE COURT: Well, I don't think I have the authority, but let me say if I do, as I tried to point out, I think the only sentence here that can be fairly compared is the one

that

22 Pierson got, which is —— for all intents and purposes,

27 years

23 for these guys that are 45 to 50 years old is life.

24 MR. WEIDNER: There's a difference though, Your

Honor

25 There's a big difference between ——

1 THE COURT: There's no parole in the federal system.

2 So you get-

3 MR. WEIDNER: Well ——

4 THE COURT: — 27 year, you get 27 years.

5 MR. WEIDNER: Well, there might — but there still may

6 well be a difference, Your Honor. And —— and now Mr.

Pierson

7 may well not be doing his 27 years after today when they

come

8 in with a motion to modify.

9 THE COURT: I don't know. I've read Rule 35, and as

far as I can see, there is no way that he can. It's more than a year since he was sentenced. The year ran in May of '96.

MR. WEIDNER: Well, they may non—oppose a Rule 25 —

THE COURT: Well, I don't know what they're going to do and I'm not going to prejudge that, but the only way he can get beyond a year is if he gives information he didn't have when the year ran. And I didn't hear him say anything today that is information he didn't have a long time ago.

MR. WEIDNER: Yeah. Well, on the basic ——

THE COURT: I don't think he's going to ——

MR. WEIDNER: But --

THE COURT: -- be able to make any motion.

MR. WEIDNER: But on the basic disparity adjustment, Your Honor, I think it's a factor you can consider Koon

24 notwithstanding the Ninth Circuit authority. Because I think

25 Koon -- and to use the Ninth Circuit's words, they said that

1 the general disparity trumped the specific. I think Koon

2 trumps their case. And it says you can consider it.

3 THE COURT: If you're right about that, you will be

4 able to persuade that you are right. I feel constrained to

5 follow what I regard as good circuit authority and that's what

6 I will do.

7 Ms. Hayden, do you have anything further to say?

8 MS. HAYDEN: The only thing that I would like to have

9 clear for the record in regard to Mr. Serrato is that in

10 addition to his complete cooperation and testimony, many times

11 his situation was very different because of the threats on his

12 life and the situations that came up as far as his wife was

13 concerned. It wasn't simply because he cooperated that

he was

14 placed in the witness protection program. That's all.

15 MR. WEIDNER: I don't agree with that characteriza-

16 tion, Your Honor, absent proof. -

17 THE COURT: Well, I understand. I don't think Serrato
18 is the appropriate comparison here. As I said earlier, I
think

19 Mr. Pierson is clearly the closest comparison, and he got

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20 months. He —— Tendler may have gotten, as I say, a
better and

21 fairer deal, but he didn't get it in federal court.

22 All right. The —— I haven't heard anything then that

23 persuades me that my preliminary decision is wrong, so I
will

24 not grant a downward departure on that basis.
25 Mr. Plunk has also argued that he is entitled to a....

[Partial Transcript of Proceedings; Imposition of Sentence; Before the Hon. John W. Sedwick, United States District Judge, November 18, 1996; pp. 129-137.]

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

United States Constitution:

Fourth Amendment. Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment. Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment. Right to Speedy Trial, witnesses, etc. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in

insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes:

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional

treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an

applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice. Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address

orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum. Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases. Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. § 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. § 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of

violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act [21 U.S.C. § 848] and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

19 U.S.C. § 1602. Seizure; report to customs officer

It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs officer any vessel, vehicle, aircraft, merchandise, or baggage seized by him, and to report immediately to such customs officer every violation of the customs laws.

19 U.S.C. § 1603. Seizure; warrants and reports

(a) Process for search warrant

Any property which is subject to forfeiture to the United States for violation of the customs laws and which is not subject to search and seizure in accordance with the provisions of section 1595 of this title, may be seized by the appropriate officer or person upon process issued in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure. This authority is in addition to any seizure authority otherwise provided by law.

(b) Customs officer's reports

Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

19 U.S.C. § 1604. Seizure; prosecution

It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the

United States district court or the Court of International Trade is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless upon inquiry and examination, the Attorney General decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

19 U.S.C. § 1605. Seizure; custody; storage

All vessels, vehicles, aircraft, merchandise, and baggage seized under the provisions of the customs laws, or laws relating to the navigation, registering, enrolling or licensing, or entry or clearance, of vessels, unless otherwise provided by law, shall be placed and remain in the custody of the appropriate customs officer for the district in which the seizure was made to await disposition according to law.

Pending such disposition, the property shall be stored in such place as, in the customs officer's opinion, is most convenient and appropriate with due regard to the expense involved, whether or not the place of storage is within the judicial district or the customs collection district in which the property was seized; and storage of the property outside the judicial district or customs collection district in which it was seized shall in no way affect the jurisdiction of the court which would otherwise have jurisdiction over such property.

19 U.S.C. § 1606. Seizure; appraisement

The appropriate customs officer shall determine the domestic value, at the time and place of appraisement, of any

vessel, vehicle, aircraft, merchandise, or baggage seized under the customs laws.

19 U.S.C. § 1607. Seizure; value $500,000 or less, prohibited articles, transporting conveyances

(a) Notice of seizure

If--

(1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $500,000;

(2) such seized merchandise is merchandise the importation of which is prohibited;

(3) such seized vessel, vehicle, or aircraft was used to import, export, transport, or store any controlled substance or listed chemical; or

(4) such seized merchandise is any monetary instrument within the meaning of section 5312(a)(3) of Title 31;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

(b) "Controlled substance" defined

As used in this section, the terms "controlled substance" and "listed chemical" have the meaning given such terms in section 802 of Title 21.

(c) Report to Congress

The Commissioner of Customs shall submit to the Congress, by no later than February 1 of each fiscal year, a report on the total dollar value of uncontested seizures of monetary instruments having a value of over $100,000 which, or the proceeds of which, have not been deposited into the Customs Forfeiture Fund under section 1613b of this title within 120 days of seizure, as of the end of the previous fiscal year.

19 U.S.C. § 1608. Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

19 U.S.C. § 1609. Seizure; summary forfeiture and sale

(a) In general. If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel, vehicle, aircraft, merchandise, or baggage forfeited, and shall sell the same at public auction in the same manner as merchandise abandoned to the United States is sold or otherwise dispose of the same according to law, and shall deposit the proceeds of sale, after deducting the expenses described in section 613 [19 USCS § 1613], into the Customs Forfeiture Fund.

(b) Effect. A declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States. Title shall be deemed to vest in the United States free and clear of any liens or encumbrances (except for first preferred ship mortgages pursuant to subsection O of section 30 of the Ship Mortgage Act, 1920 (46 U.S.C. App. 961) or any corresponding revision, consolidation, and enactment of such subsection in title 46, United States Code) from the date of the act for which the forfeiture was incurred. Officials of the various States, insular possessions, territories, and commonwealths of the United States shall, upon application of the appropriate customs officer accompanied by a certified copy of the declaration of forfeiture, remove any recorded liens or encumbrances which apply to such property and issue or reissue the necessary certificates of title, registration certificates, or similar documents to the United States or to any transferee of the United States.

21 U.S.C. § 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. ... Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision

of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives or ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, is derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendants is an individual or $5,000,000 if the defendant is other than an individual, or both. ... Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term

of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * *

21 U.S.C. § 843. Prohibited acts C

Unlawful acts

* * *

Communication facility

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

* * *

Penalties

(d) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 848. Continuing criminal enterprise

Penalties; forfeitures

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

Conditions for life imprisonment for engaging in continuing criminal enterprise

(b) Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section, if—

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (c)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

Continuing criminal enterprise defined

(c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(d) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

* * *

21 U.S.C. § 853. Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes--

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that--

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an

information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Warrant of seizure

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to

seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General

With respect to property ordered forfeited under this section, the Attorney General is authorized to--

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may--

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders

The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to

testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant--

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

(q) Restitution for cleanup of clandestine sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture of methamphetamine, may--

(1) order restitution as provided in sections 3612 and 3664 of Title 18;

(2) order the defendant to reimburse the United States for the costs incurred by the United States for the cleanup associated with the manufacture of methamphetamine by the defendant; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663 of Title 18.

21 U.S.C. § 881. Forfeitures

(a) Subject property. The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this title.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to

have been committed or omitted without the knowledge, consent or willful blindness of the owner.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this title.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this title, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this title, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this title.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this title or title III.

(10) Any drug paraphernalia (as defined in section 1822 of the Mail Order Drug Paraphernalia Control Act [21 USCS § 857]).

(11) Any firearm (as defined in section 921 of title 18, United States Code) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

(b) Seizure pursuant to Supplemental Rules of Certain Admiralty and Maritime Claims. Any property subject to civil forfeiture to the United States under this title may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules of Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this title;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this title.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under

this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) **Custody of Attorney General.** Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this title, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) **Other laws and proceedings applicable.** The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this title, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this title by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e) **Disposition of forfeited property.** (1) Whenever property is civilly or criminally forfeited under this title the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 616 of the Tariff Act of 1930, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) except as provided in paragraph (4), sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

* * *

(h) Property title, etc. vested in United States. All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil proceeding. The filing of an indictment or information alleging a violation of this title or title III, or a violation of State or local law that could have been charged under this title or title III, which is also related to civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue. In addition to the venue provided for in section 1395 of title 28, United States Code, or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

[(k)](l) Functions. The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district

wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided

in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Federal Rules of Appellate Procedure Rule 22. Habeas corpus and Section 2255 Proceedings

(a) Application for the Original Writ.

An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district

judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

Federal Rule of Criminal Procedure 35.
Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year

after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

Federal Rule of Evidence 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

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Federal Rule of Evidence 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Federal Rule of Evidence 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is

not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether he defendant did not did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

United States Sentencing Guidelines, § 5K1.1
Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Ninth Circuit Rule 22-1. Certificate of Appealability; Capital and Noncapital Cases

(a) General Procedures.

The procedures set forth in Fed. R. App. P. 22(b) shall apply to requests for certificates of appealability in proceedings under 28 U.S.C. §§ 2254 and 2255. A certificate of appealability must first be considered by the district court. If the district court grants a certificate of appealability, it shall state which issue(s) satisfy the standard set forth in 28 U.S.C. § 2253(c)(2). The Court of Appeals will not act on a request for a certificate of appealability if the district court has not first ruled on the request.

(b) District Court Records.
If the district court denies a certificate of appealability in a section 2254 proceeding, the district court clerk shall forward the entire record to the court of appeals. If the district court denies a certificate of appealability in a section 2255 proceeding, the district court clerk shall forward that portion of the record beginning with the filing of the section 2255 motion.

(c) Denial In Full By District Court; Motion By Petitioner.
If the district court denies a certificate of appealability as to all issues, petitioner may, within thirty-five days of the district court's entry of its order denying a certificate of appealability, file in the court of appeals a motion for a certificate of appealability along with a statement of reasons why a certificate should issue as to any issue(s). If no motion for a certificate of appealability is filed, the court of appeals will deem the notice of appeal to constitute a request for a certificate of appealability. In either case, the respondent may file a response within thirty-five days of the notice of appeal or motion, whichever is later. In capital cases where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after the date petitioner's motion is served or, if no motion is filed, as soon as practicable after the district court's entry of its order denying a certificate of appealability.

(d) Partial Denial By District Court; Motion By Petitioner.
If the district court denies a certificate of appealability in part, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification. Petitioners desiring broader certification must file, in the court of appeals, a separate motion for broader certification, along with a statement of reasons why a certificate should be granted as to any issues(s) within thirty-five days of the district court's entry of its order denying a certificate of appealability. Respondent may file an opposition within thirty-five days of the date petitioner's motion is served. If a motion for broader certification is filed in a capital case where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after service of the motion. Otherwise, respondent shall file a response within thirty-five days of the date petitioner's motion is served.